Petitioners filed a petition for rehearing and rehearing *en banc*. In the petition, petitioners noted controlling authority from this Court that a party is not bound by the law as stated in jury instructions when it has sought, and been denied, judgment as a matter of law on that issue. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 514 (1988). The panel, however, declined to treat petitioners' post-remand filing—the memorandum opposing judgment for respondents—as sufficient to preserve its request for judgment as a matter of law, saying: "Unfortunately for the defendants, they did not make a Rule 50 motion after judgment was entered on the state law claims. Their motion 'cannot be measured by [their] unexpressed intention or wants.' *Johnson v. New York, N.H. and H.R. Co.*, 344 U.S. 48, 51 (1952)." Pet. App. 16a.

REASONS FOR GRANTING THE WRIT

This case presents important issues about the proper construction and application of Rule 50 of the Federal Rules of Civil Procedure. To begin with, it raises a threshold question similar to that now before the Court in *Unitherm*: whether, having filed a motion for judgment as a matter of law at the close of the evidence, a party must renew that motion after the jury verdict in order to preserve its arguments for judgment, despite the specific language of Rule 50(b) stating that any submission of the case to the jury is automatically "subject to the court's later deciding the legal questions raised by the motion." Rule 50(b), Fed. R. Civ. P. If the answer to that question is no—as we submit that it should be (*see* pages 8-16 *infra*)—then, at the very least, the judgment in this case should be vacated, and the case remanded to the court of appeals for further proceedings.[3]

---

[3] As we discuss, *see* page 17 *infra*, the Court may want to grant the petition to consider whether a court of appeals may grant judgment (rather than just a new trial) to a verdict-loser in the absence of a post-verdict

If the Court instead holds that a verdict loser must renew a pre-verdict motion, then this case presents a second critical issue: what constitutes an adequate renewal. Here, the Ninth Circuit concluded that petitioners had failed to satisfy the requirements of Rule 50(b) even though petitioners—in a post-verdict memorandum opposing the entry of new judgments for respondents—had repeated the position taken in their prior Rule 50(a) motion for judgment as a matter of law, had expressly stated that an intervening Ninth Circuit ruling on statute of limitations grounds was "fatal" to respondents' entire case, and had made clear their belief that the state law claims were untimely as a matter of law. Quoting language from *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), and apparently relying on the fact that petitioners had not explicitly asked for judgment in their favor, the court of appeals held that filing to be insufficient on the ground it could not be "'measured by its unexpressed intention or wants.'" Pet. App. 16a (quoting *Johnson*, 344 U.S. at 51).

This holding, while faithful to *Johnson*, is in all other respects insupportable. It is now well recognized that, under Rule 7(b), Fed. R. Civ. P., federal courts "generally avoid engaging in an overly technical evaluation of the papers on which the motion is predicated and grant or deny the requested relief on the basis of the underlying merits of the petition." Wright & Miller, *Federal Practice and Procedure*, § 1192, at 56-57 (2004). *See also Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) ("the requirements of the rules of procedure should be liberally construed.") The Advisory Committee on Civil Rules, addressing the standards of Rule 7(b) with respect to the filing of motions, has stated that Rule 7(b) "does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on." Advisory Committee Note to 1966

---

motion for judgment as a matter of law. It is not clear whether that question is before the Court in *Unitherm*. *See* pages 16-17 *infra*.

Amendment of Rule 59(d), Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 122 (1966). The federal courts have commonly applied the "fair indication" standard, or similar standards, in construing motions under, among other provisions, Rule 50(a) and Rule 59 of the Federal Rules. *See, e.g., Battle v. Memorial Hospital at Gulfport*, 228 F.3d 544 (5th Cir. 2000); *Tsai v. Rosenthal*, 297 F.2d 614 (8th Cir. 1961).

There is no reason to apply a more exacting standard here. Whatever its merits at the time, the "unexpressed intention or wants" test announced in *Johnson* fits poorly with modern rules of pleading. As long as it remains on the books, however, it will continue to provide courts, like the Ninth Circuit here, with an instrument for arbitrarily rejecting filings that, while not explicitly asking for particular relief, nonetheless make clear to the parties and the court what that relief should be. The Court should grant review to correct this historical anomaly.

I. THIS CASE PRESENTS THE SAME BASIC ISSUE AS THE *UNITHERM* CASE PRESENTLY BEFORE THE COURT

The threshold issue in this case is similar, if not identical, to the issue presented in *Unitherm*, No. 04-597, now pending before this Court: whether a litigant must file a Rule 50(b) motion after a jury verdict in order to preserve its right to argue that the evidence was insufficient as a matter of law.[4] The decision below, in concluding that petitioners' post-verdict filing did not amount to a Rule 50(b) motion, *see* Pet. App. 16a, necessarily held that a Rule 50(b) motion was required. Although there is considerable authority to support

[4] As we discuss below, *see* pages 18-23 *infra*, the case also raises the subsidiary issue of what constitutes a sufficient post-verdict filing for purposes of Rule 50(b). The Court need not reach that issue if no further filing is necessary to preserve the sufficiency-of-the-evidence argument.

that view, we nonetheless think that it is an incorrect reading of the Rule.

To begin with, that construction of Rule 50(b) gives too little weight to the specific language of the Rule. Although the Rule could simply have stated that a dissatisfied litigant has to file a new motion for judgment after trial—thereby establishing that any prior motion for judgment as a matter of law was, at that time, a nullity—it instead makes a point of declaring that "[i]f for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury *subject to the court's later deciding the legal questions raised by the motion.*" Rule 50(b), Fed. R. Civ. P (emphasis added). That language is read most naturally to mean that any action taken on the earlier motion is preliminary rather than final, and that the motion remains open for further consideration after the verdict is rendered. That view is reinforced by the fact that, even when the movant does file a post-verdict motion, the court is limited to granting relief on the grounds already presented in the pre-verdict motion. *See* Wright & Miller, § 2537, at 344-45.

It is possible, of course, to read Rule 50(b) a different way: to say that the immediately following sentence in Rule 50(b)—which permits (but does not explicitly require) a litigant to "renew" its close-of-the-evidence motion—means that the earlier motion has no continuing effect in the absence of renewal. But there are several problems with this reading. First of all, it is in tension with the origins of the Rule. Prior to adoption of Rule 50(b), this Court had held that, while a district court could direct a verdict *before* submitting a case to the jury, it could not grant judgment to the moving party *after* an unfavorable verdict without running afoul of the Seventh Amendment. *See Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913). This holding raised serious practical difficulties because, if the grant of a directed verdict before submission

was later reversed, the proceedings had to start again, without the possibility of simply reinstating the jury verdict. In *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), however, the Court had partially ameliorated the effects of its *Slocum* decision, concluding that, without violating the Seventh Amendment, a trial judge could grant judgment after trial to the verdict loser when the judge had expressly reserved decision on the pre-trial motion for directed verdict. *See* 295 U.S. at 656-61. *But see Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 394 (1937) (following *Slocum* in the absence of an express reservation).

The terms of Rule 50(b) were drafted, against this background, specifically to allow federal courts to enter post-verdict judgments without usurping the right to jury trial. *See* Wright & Miller, § 2522, at 245; *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940). To accomplish this purpose, the Rule reserves decision on the prior motion by operation of law—that is, it automatically makes the decision "subject to the court's later deciding the legal questions raised by the motion"—even when the trial judge has denied the motion without signaling any intention to revisit it. Given the reason for that language, it seems too dismissive of the underlying jury trial concerns to announce that decision on the prior motion has *not* been reserved after all, and that the movant must file a new motion in order to obtain the relief already requested in the earlier one. Rather, Rule 50(b) should mean what it says: that any submission to the jury is subject to later resolution of the legal questions previously raised in the Rule 50(a) motion.

The second problem with the mandatory-second-motion reading of Rule 50(b) is that, taken to its logical conclusion, it proves too much. Thus, for example, it would mean that a trial court, having expressly reserved decision on a motion for judgment at the close of the evidence, would nonetheless be barred from ruling on the motion after trial unless the moving party asked the Court to do what it had already committed

itself to do. That would carry redundancy to a nonsensical level. *See Szmaj v. American Telephone & Telegraph Co.*, 291 F.3d 955, 958 (7th Cir. 2002) (holding it unnecessary to ask trial court to decide motion on which it had reserved decision). Yet, if federal courts tried to avoid this pointless duplication by holding that a district court could decide an expressly reserved Rule 50(a) motion but not an unreserved one, that approach would largely rewrite Rule 50(b), which quite deliberately obliterates the distinction between reserved and unreserved motions, deeming them both subject to later determination after submission of the case to the jury.[5]

Not surprisingly, several federal courts of appeals have resolved these troublesome questions by holding that a trial court may grant judgment after trial even without a renewed filing seeking such relief. *See, e.g., Mosser v. Fruehauf Corp.*, 940 F.2d 77, 84 n.2 (4th Cir. 1991) (reserved decision); *Norton v. Snapper Power Equipment*, 806 F.2d 1545, 1547 (11th Cir. 1987) (*sua sponte* decision); *Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434, 436-39 (7th Cir. 1957) (reserved decision). *See also Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 354-56 (5th Cir. 1985). The Eleventh Circuit, for example, has expressly noted and relied on the fact that the Rule makes denial of the Rule 50(a) motion subject to a later determination by the court. *See, e.g., Norton*, 806 F.2d at 1547 ("Given the clear language of this rule, it is unnecessary for the district court to expressly reserve its ruling on a motion for directed verdict.") Furthermore, several courts of appeals have noted that, if judgment is rendered for

---

[5] We note that a litigant denied judgment before submission to the jury will typically have a strong incentive to renew its Rule 50(a) motion after verdict in the hope that the trial judge will view it differently at that point. Thus, even without a post-verdict filing being required, it may be expected that many verdict losers will take advantage of the permissive language of Rule 50(b) and renew their motions, rather than simply allow the earlier decisions to become final without further action.

the verdict loser, the verdict winner is in a position to petition the district court for a new trial, minimizing any possible harm. *See Norton*, 806 F.2d at 1547; *Shaw*, 249 F.2d at 439. And, of course, there is nothing inherently prejudicial about consideration of the legal issues without a second motion for judgment, because the earlier Rule 50 motion has already put the opposing party on notice of the legal arguments to be addressed, and, indeed, it has done so at a time when (unlike after the verdict) the opposing party can still supplement the record in order to cure any alleged evidentiary deficiency.

Although these cases address the power of district courts, much of their reasoning carries over to the question presented here and in *Unitherm*: whether appellate courts can review claims for judgment as a matter of law, even in the absence of a post-verdict motion.[6] Rule 50 does not speak directly to this point, but the usual expectation would be that an appellate court can address the same legal questions as the trial court and that it can award the same relief. Moreover, because the legal issues have been presented in the close-of-the-evidence motion, the moving party has satisfied the usual test of having raised the issues below and of having given the district court a full opportunity to decide them. *See generally Youakim v. Miller*, 425 U.S. 231, 234 (1976). While it is true that a trial court is more familiar with the particular facts of a case, that difference has less to do with whether an appellate court can resolve the legal issues presented by a Rule 50(a) motion, than with whether it should also determine the proper relief if it finds the motion meritorious. That issue—which

---

[6] Several cases have observed that a district court could just ask the moving party to renew its earlier motion, thus meeting any possible filing requirement of Rule 50(b). *See Norton*, 806 F.2d at 1547; *First Safe Deposit National Bank v. Western Union Telegraph Co.*, 337 F.2d 743, 746 (1st Cir. 1964). Although that possibility would not exist on appeal, the other reasons for not making a post-trial motion a precondition to appellate review appear to apply with full force. *See* pages 14-15 *infra*.

we discuss below (*see* pages 14-15 *infra*)—is separate and distinct from the authority of an appellate court to consider the legal arguments in the first place.

We recognize that this Court has held otherwise. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co., Inc. v. San Roman*, 332 U.S. 571 (1948); *Johnson*, 344 U.S. at 50-54. *See also Fountain v. Filson*, 336 U.S. 681 (1949). Taken at face value, the *Cone-Globe Liquor-Johnson* trilogy of Rule 50 decisions seems to establish a hard-and-fast rule that the absence of a post-trial motion bars an appellate court from ordering judgment as a matter of law. The Court appears to have adopted this rule, however, largely for a particular reason: at the time, it was concerned that judgments granted by an appellate court, without a post-trial motion, would improperly displace the trial court from deciding whether a successful Rule 50 motion should result in judgment for the movant or only in a new trial. Thus, in *Cone*, noting that Rule 50(b) permits a court to grant either judgment or a new trial, the Court said that "[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case that no appellate printed transcript can impart." 330 U.S. at 216. Similarly, in *Globe Liquor*, the Court reiterated that questions about the proper remedy under Rule 50(b) were "questions which [the non-movant] was entitled under Rule 50(b) to have passed upon in the first instance by the trial court." 332 U.S. at 574. *See also Johnson*, 344 U.S. at 50.[7]

---

[7] In *Johnson*, the Court stated: "We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids *the trial judge* or an appellate court to enter such a judgment." 344 U.S. at 50 (emphasis added). The prior cases (*Cone*, *Globe Liquor*, and *Fountain*), however, had not prohibited the granting of judgment by a trial court, and this lan-

Recognizing this analytical underpinning, this Court recently described *Cone*, *Globe Liquor*, *and Johnson* as cases "emphasizing the importance of giving the party deprived of a verdict the opportunity to invoke the discretion of the trial judge to grant a new trial." *Weisgram v. Marley Co.*, 528 U.S. 440, 449 (2000). But changes to Rule 50 itself, as well as later decisions from this Court, have made that "opportunity" less important. Thus, following the decision in *Johnson*, Rule 50 was amended to make explicit that an appellate court, in reversing denial of a motion for judgment as a matter of law, could order a new trial. *See* Fed. R. Civ. P. 50(d). Moreover, this Court has since held that, in reviewing claims for judgment as a matter of law, appellate courts, like trial courts, may either order a new trial or, in appropriate circumstances, enter judgment themselves. *See Weisgram*, 528 U.S. at 447-57; *Neely v. Martin K. Eby Constr. Co., Inc.*, 386 U.S. 317, 322 (1967). *See also* 28 U.S.C. § 2106. At the same time, the Court has emphasized that appellate courts are not obligated to choose the proper remedy, but may simply reverse denial of the motion for judgment as a matter of law and remand to the trial court for consideration of the appropriate relief. *See Weisgram*, 528 U.S. at 456 (noting "myriad situations in which the determination whether a new trial is in order is best made by the trial judge").

The Court has also recognized that Rule 50(b) review by an appellate court—and even entry of judgment by that court—need not cause prejudice to the opposing party. Thus, in *Weisgram*, the Court pointed out that the verdict winner has the chance on appeal "to argue in support of the jury's verdict or, alternatively, for a new trial." 528 U.S. at 454. In addition, the Court noted that "if judgment is instructed for the verdict loser," 528 U.S. at 454-55, the verdict winner "will have a further chance to urge a new trial in a rehearing peti-

---

guage has been regarded by some courts as non-binding dicta. *See, e.g., Shaw*, 249 F.2d at 438.

tion." 528 U.S. at 455. That opportunity is essentially the same opportunity available to a verdict winner faced with judgment as a matter of law in the district court.

If all the cases from this Court are considered together, therefore, the better reading of Rule 50(b) would seem to be that an appellate court, like a district court, may address judgment-as-a-matter-of-law questions, and award any appropriate relief, even in the absence of a renewed post-trial motion. This Court has observed, however, that principles of *stare decisis* are at their strongest "in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *see Hubbard v. United States*, 514 U.S. 695, 711-12 (1995) (quoting *Illinois Brick*).[8] The problem here is that adherence to precedent has resulted, not in stability, but in disarray. Although no federal court of appeals feels free to disregard *Cone* and its successors—and thus to order judgment for a litigant that failed to file a post-verdict motion—several Circuits have tried to lessen the severity of the early cases by saying that they do not bar the granting of a new trial to a party entitled to judgment. *See, e.g., Cummings v. General Motors Corp.*, 365 F.3d 944, 950 (10th Cir. 2004); *Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996). Other courts of appeals have read the cases from this Court more broadly, declaring that the

---

[8] Indeed, the argument in favor of *stare decisis* is supported here by the fact that this Court, prior to its decision in *Cone*, declined to adopt a proposed amendment to Rule 50, which provided: "The making of a motion for judgment in conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for a directed verdict should be entered." *See* Petitioner's Reply Brief, *Johnson v. New York, N.H. & H.R. Co.*, No. 40 (Oct. Term 1952), at 5 (quoting *Moore's, Federal Practice*, Fed. Pr. 2d Ed. Vol. 5. pp. 2304-2305). As we discuss in the text, however, the arguments against *stare decisis* are ultimately more compelling.

absence of a post-trial motion completely precludes review of an adverse judgment for sufficiency of the evidence, except under a "miscarriage of justice" standard. *See, e.g., Adames v. Perez*, 331 F.3d 508, 511-12 (5th Cir. 2003); *Cross v. Cleaver*, 142 F.3d 1059, 1069-70 (8th Cir. 1998); *Patel v. Penman*, 103 F.3d 868, 879 (9th Cir. 1996).

Neither of these approaches is entirely satisfactory. On the one hand, a reading of Rule 50(b) that denies all relief to a party failing to file a post-trial motion simply turns the correct result in the case upside-down: a party that, by rights, should have won judgment without even facing a jury verdict ultimately winds up with judgment against it, all because it did not repeat arguments that it had already made once and that were, under the language of Rule 50(b), made "subject to the court's later deciding the legal questions" raised by the earlier motion. On the other hand, a reading of Rule 50(b) that allows the party a new trial but not judgment, and does so only because the failure to file a post-verdict motion constricts the remedy available under the *Cone* trilogy, has the dubious effect of denying a litigant the relief to which it is actually entitled, and substituting lesser relief that would otherwise not be awarded. It is doubtful that any federal court, addressing the matter without controlling precedent, would conclude that this half-a-loaf resolution is the appropriate way to apply Rule 50(b).

This Court presumably will settle much of this confusion in *Unitherm*, but how much is not entirely clear. There, the Court drafted a question that, on its face, appears broad enough to encompass all possible solutions to the absence of a renewed Rule 50(b) motion, ranging from an absolute prohibition on appellate review of the sufficiency of the evidence to a recognition that appellate courts, no less than district courts, can order judgment. (The question presented in *Unitherm* is the same as the first question presented in this petition. *See* page (i) *supra*.) At the same time, however, the

Court in *Unitherm* denied the respondent's conditional cross-petition for certiorari, *see* 125 S. Ct. 1399 (2005), thereby raising doubts about whether the Court will address the right to a remedy (judgment) that goes beyond the relief (a new trial) granted in that case. It is possible, therefore, that the larger question of the right to judgment absent a renewed post-trial motion will remain unresolved.

We submit, therefore, that the Court should hold this case pending resolution of the question presented in *Unitherm*. If the Court holds that a post-trial Rule 50(b) motion is a condition precedent to any relief, then the Court should deny review on the first issue presented here, and grant review on the second issue: what form a "renewed" Rule 50(b) motion must take. *See* pages 18-23 *infra*. If the Court determines that an appellate court may grant a new trial without a post-trial motion under Rule 50(b), but does not reach the question whether it can grant judgment, it should either grant the petition in its entirety—to settle that important unresolved issue—or, at the least, grant the petition, vacate the judgment, and remand for a determination of whether petitioners are entitled to a new trial in lieu of judgment. And, if the Court concludes that an appellate court can grant judgment as a matter of law, as well as a new trial, it should grant the petition, vacate the judgment below, and remand for consideration of petitioners' right to judgment.

We note that a remand to the Ninth Circuit would not be a futile gesture. Although the court of appeals declined to find that the California statute of limitations barred respondents' state law claims, it did so on the ground that petitioners had not objected to the jury instructions and were thus bound by the (erroneous) statement of California law in those instructions. *See* Pet. App. 3a-4a. That holding is defensible only if the Court determines that petitioners needed to, and did not, file a post-trial Rule 50(b) motion. The unmistakable law is that "[t]he failure of a party to object to the jury instructions

does not make them the law of the case so as to preclude the entry of judgment as a matter of law if it is required by law." Wright & Miller § 2537, at 348-49. Indeed, this Court has squarely held that a party may obtain judgment as a matter of law, according to the correct view of the law advanced in a motion for judgment as a matter of law, even though it has failed to object to jury instructions setting forth an incorrect statement of the law. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 518 (1988); *see also Air-Sea Forwarders, Inc. v. Asia Air. Co., Ltd*, 880 F.2d 176, 181-83 (9th Cir. 1989); Pet. App. 23a n. 4 (*Pincay I*) (citing *Air-Sea Forwarders*); Pet. App. 6a & n. 7 (Kleinfeld, J., dissenting) (citing *Pincay I*).[9] The Ninth Circuit's reliance on petitioners' failure to object to the jury instructions is thus inextricably linked to its belief, made explicit in the order denying rehearing, *see* Pet. App. 16a, that petitioners had not satisfied the conditions of Rule 50(b) by filing a sufficient post-trial motion for judgment. Otherwise, that part of the Ninth Circuit's decision resting on the failure to object to the jury instructions would itself be grounds for review by this Court, even summary reversal.

II. THE DECISION BELOW, BY LOOKING TO THE FORM OF RESPONDENTS' POST-VERDICT FILING RATHER THAN TO ITS SUBSTANCE, IS CONTRARY TO RULE 7(B) OF THE FEDERAL RULES AND TO PRINCIPLES OF MODERN PLEADING

If this Court holds in *Unitherm* that a litigant cannot obtain sufficiency-of-the-evidence review without renewing a prior

---

[9] Judge Kleinfeld, dissenting below, found it "crystal clear" that, if the correct statute of limitations law were applied (rather than the law given to the jury in the instructions), petitioners would be entitled to judgment on the state law claims. *See* Pet. App. 6a-7a. The Ninth Circuit's view of the Rule 50(b) requirements thus has the practical effect of granting respondents a windfall judgment in place of the judgment that properly belongs to petitioners.

Rule 50(a) motion, it should grant review here to determine what constitutes an adequate renewal. In *Johnson* this Court declined to find that a post-trial motion asking for the verdict to be set aside was a sufficient Rule 50(b) motion, remarking that the party had not "as the rule requires move[d] within ten days after verdict 'to have judgment entered in accordance with his [its] motion for a directed verdict.'" 344 U.S. at 50 (quoting an earlier version of Rule 50(b)). Although the defendant in *Johnson* argued that its motion was "'intended to be a motion for judgment in its favor or for a new trial,'" 344 U.S. at 50, the Court dismissed that contention on the ground that "motions cannot be measured by [a party's] unexpressed intention or wants." 344 U.S. at 51. The Ninth Circuit relied on this "unexpressed intention or wants" language in holding that petitioners' post-verdict filing here—in form, an opposition to respondents' own motion for judgment (*see* Pet. App. 26a-42a)—was insufficient to preserve petitioners' right to argue for judgment in their favor. *See* Pet. App. 16a.

To the extent that this strict code of pleading bars relief on appeal simply because a litigant did not explicitly ask for such relief below, it is dramatically out of step with modern practice. This Court has made clear "that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres*, 487 U.S. at 316 (discussing Federal Rules of Appellate Procedure). *See also Burnett v. Grattan*, 468 U.S. 42, 50 n. 13 (1984) ("the pleading and amendment of pleadings rules in federal court are to be liberally construed.") In contrast to the arcane rules of prior centuries, this rule of liberal construction aims to assure that the outcome of cases is determined more by the merits of the parties' positions than by their exact negotiation of complex procedural hurdles. Rather than require that pleadings and motions conform to any precise format, this Court has been willing to find "that the litigant has complied with the

rule if the litigant's action is the functional equivalent of what the rule requires." *Torres*, 487 U.S. at 317.

This flexible approach has been reflected in numerous cases interpreting the Federal Rules. Indeed, while Rule 7(b) of the Rules declares that a litigant "shall state with particularity the grounds [for a motion], and shall set forth the relief or order sought," Fed. R. Civ. P. 7(b), that Rule itself has been given a liberal construction. Discussing Rule 7, a leading treatise has noted that "courts generally avoid engaging in an overly technical evaluation of the papers on which a motion is predicated and grant or deny the requested relief on the basis of the underlying merits of the petition." Wright & Miller, § 1192, at 56-57. As one federal court of appeals has recently observed, "[t]echnical precision is not the standard. Rather, the moving party need only adequately notify the court of the issues being raised." *Miller v. Eby Realty Group*, 396 F.3d 1105, 1114 (10th Cir. 2005) (internal quotation marks omitted). The Advisory Committee on the Civil Rules long ago made the same point: "[Rule 7(b)(1)] does not require ritualistic detail but rather a fair indication to court and counsel of the substance of the grounds relied on." Advisory Committee Note to 1966 Amendment of Rule 59(d), 39 F.R.D. at 122.

These principles apply fully to motions for judgment as a matter of law and for a new trial. For example, "federal courts . . . take a liberal view of what constitutes a motion for judgment as a matter of law at the close of all the evidence in deciding whether there was a sufficient prerequisite for the later [Rule 50(b)] motion." Wright & Miller, § 2537, at 338-39. *See Battle*, 228 F.3d at 544; *Galdieri-Ambrosini v. National Realty & Development Corp.*, 136 F.3d 276 (2nd Cir. 1998). Similarly, with respect to new trial motions—which, like Rule 50(b) motions, are made after the hurly-burly of trial and could theoretically be held to a more rigorous standard—"the rules do not require undue particularity. . . .

Reasonable specification should be sufficient." Wright & Miller, § 2811, at 132-33. *See also Tsai*, 297 F.2d at 619 (approving "broad construction" of Rule 7(b) for new trial motions); Wright & Miller, § 1192, at 61 ("skeletal or pro forma motions for a new trial are not uncommon.")

It is flatly at odds with these principles to hold that a court must deny relief unless a filing specifically asks for it—even when arguments in the filing point naturally to that relief—on the theory that the litigant has not overtly expressed its "intention or wants." 344 U.S. at 51. No one questions that, under any test for determining whether a filing is sufficient, a court must be able to understand the party's "intention" without protracted effort, and a litigant always runs the risk that a less-than-clear submission will be deemed too hard to decipher. But it is one thing to say that a filing must, at a minimum, meet a "fair indication" or "functional equivalent" standard (*see* pages 19-20 *supra*)—and thus put the court and opposing counsel on notice of the particular argument—and quite another to say that it must make explicit what can be readily derived from the filing itself. The additional rigidity demanded by the latter standard serves no legitimate purpose in the federal system.

This case provides a striking example of the mischief worked by an overly literal application of the "express intention" standard. Although petitioners could have filed a separate post-remand motion specifically asking for judgment as a matter of law—rather than just submitting a memorandum opposing respondents' request for judgment—their position would have been exactly the same: their principal ground for opposing judgment was that respondents' state-law claims were barred in their entirety as a matter of law. Referring to the earlier court of appeals' decision in *Pincay I*, petitioners expressly stated that the conclusions reached by the Ninth Circuit with respect to the RICO claims were "fatal to *all* of [respondents'] state law claims." Pet. App. 34a. The memo-

randum then explained that the trigger for the statute of limitations under California law was the same as it was under RICO, which meant that the state law claims "are also necessarily time-barred." Pet. App. 36a. The argument then concluded by repeating the contention that the Ninth Circuit holding in *Pincay I* "renders [respondents'] other claims untimely under the applicable statute of limitations . . . ." Pet. App. 37a.

It is hard to imagine how the district court (or respondents themselves) could have read this filing without comprehending that petitioners thought they were entitled to judgment. Although petitioners did not specifically ask for it, the granting of judgment to petitioners would be the predictable consequence of a holding that respondents had filed their claims too late. As petitioners had already made plain in their Rule 50(a) motion, there was no case to try to a jury in the first place because all the claims, state and federal, were untimely as a matter of law. Furthermore, and even more telling, the Ninth Circuit had agreed with petitioners regarding the untimeliness of the federal RICO claims and had held that petitioners were entitled to judgment on those claims as a matter of law. *See Pincay I*, Pet. App. 24-25a. Since petitioners' contention was that the statute of limitations issues for the state and federal claims were legally identical, it would follow without question that the remedy would also be identical: judgment for petitioners as a matter of law.[10]

In short, had the Ninth Circuit asked whether petitioners' memorandum gave both the district court and respondents a fair indication that petitioners were entitled to judgment, the inevitable conclusion would have been that it did. Following

---

[10] The district court thus had a full opportunity to consider petitioners' arguments after the jury verdict and, if it agreed with them, to address what their legal effect would be. In the event, the court rejected all petitioners' arguments and entered judgment for respondents. *See* Pet. App. 8a-15a.

the formulation of *Johnson*, however, the court instead asked whether the request for judgment had been "expressed" and held that it had not. That is simply the wrong question. To the extent that *Johnson* requires adherence to that inquiry, rather than the more flexible inquiry recognized under Rule 7(b), it should now be laid to rest.

The overruling of *Johnson* on this point would raise few legitimate *stare decisis* concerns. The opinion in *Johnson* was simply stating a rule of construction, not announcing a binding interpretation of any particular federal rule. As a result, one would not expect the "unexpressed intention or wants" standard to be the subject of later legislation or rule-making. Rather, it is a purely judicial creation, and this Court should grant review to make clear that it no longer governs the construction of filings in federal court.

CONCLUSION

The petition should be held pending the decision in *Unitherm*. Once that case has been decided, the Court should either grant, vacate, and remand in accordance with that decision or grant this petition to address important unresolved issues.

Respectfully submitted,

ROBERT SILVER
ANDREW HAYES
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

H. BARTOW FARR, III *
FARR & TARANTO
1220 19th Street, NW
Suite 800
Washington, DC 20036
(202) 775-0184

* Counsel of Record

APPENDICES

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Mar. 16, 2005]

No. 02–56491
D.C. No. CV-89-01445-WMB

LAFFIT PINCAY, JR.; CHRISTOPHER J. MCCARRON,
Plaintiffs-Appellees,

v.

VINCENT S. ANDREWS; ROBERT ANDREWS;
VINCENT ANDREWS MANAGEMENT CORP.,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Senior Judge, Presiding

Argued and Submitted July 16, 2003
Pasadena, California

MEMORANDUM *

Before: NOONAN, KLEINFELD, and WARDLAW, *Circuit Judges*.

In *Pincay v. Andrews*, 238 F.3d 1106 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 195 (2001) (*Pincay I*), we reversed a

---

* This disposition is not appropriate for publication and. may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

judgment based on a jury verdict in favor of Pincay and McCarron (Pincay) against their former investment advisor and partner, Vincent Andrews and his associates (Andrews). We held that no reasonable jury could find Pincay did not have constructive notice of his injuries before 1985 and that therefore Pincay's RICO action was barred by the four-year statute of limitations applicable to civil RICO. *Id.* at 1110. We added: "Finally, our holding is limited to the civil RICO claims at issue on appeal and does not disturb the jury's verdict with regard to Pincay and McCarron's state law claims." *Id.*

Subsequently, the Pincay plaintiffs elected to accept the damages awarded for their state law claims. Andrews contended that the constructive notice found by us in *Pincay I* applied equally to the state claims. Citing *Bennett v. Hibernia Bank,* 47 Ca1.2d 540, 563 (1956), the district court ruled that it did not. The district court further ruled that the state statute of limitations had been tolled by the defendants' fraudulent concealment, a tolling denied in *Pincay I* because constructive notice prevented tolling under the RICO line of cases. The district court further refused to order a remittitur from the jury verdict and denied the defendants' request to eliminate punitive damages.

On this appeal, the defendants reiterate their argument that *Pincay I* decided the case by deciding that the plaintiffs had constructive notice in 1980 and so are now barred by the state statute of limitations. The defendants add that their written disclosures precluded a finding of fraud or an award of punitives. They add that, lacking evidence of the defendants' net worth, the jury improperly speculated in awarding the punitives, and that various factors should have reduced the compensatory damages.

Applying state law to a case in which *Pincay I* describes many of the facts, we recite only those facts relevant to our decision on the state law claims.

The State Statute Of Limitations. Andrews's principal contention is that the California statute of limitations of three years bars Pincay's claims because Pincay had notice in 1980 and brought suit in 1989. The jury, however, was instructed as follows:

> If the plaintiff and defendant are in a fiduciary relationship, the plaintiff is under no duty of inquiry until the relationship is terminated. When the defendants are fiduciaries, the plaintiffs are deemed to have discovered their potential claims when each of them actually discovered the facts constituting the claim.

Both parties submitted the language of this instruction to the district court. The district judge twice afforded opportunity to counsel to object to this instruction and to other pertinent instructions. No objections were offered by counsel. Under Ninth Circuit precedent, a party may not object to a jury instruction to which he has not made timely objection; no plain error exception applies. *Voohies-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001).

The Pincay plaintiffs testified that relying on the Andrews defendants' assurances and not reading the documents tendered them, they did not discover the facts constituting their claim until after 1986. The jury returned special verdicts answering with particularity 68 questions and finding that each of the Andrews defendants were fiduciaries for the Pincay plaintiffs; that each of the defendants made false representations and reassurances on which the plaintiffs justifiably relied; that the defendants intentionally concealed material facts from the plaintiffs; and that the Pincay claims for fraud and intentional concealment of the fraud were not barred by the statute of limitations.

The argument now advanced by Andrews on appeal is, in substance, an attack on the jury findings and on the jury instructions. It is an attack that comes over eleven years after

the trial and the verdicts. It is an attack excluded by our understanding of former Fed. R. Civ. Proc. 51. *Voohies-Larson*, 241 F.3d at 713. The new rule does permit an attack for plain error on jury instructions that were unobjected to, but the rule applies to a proceeding commenced before December 2003 only "insofar as just and practicable." 538 U.S. 1085 (2003) (preliminary print). Andrews now argues that the California rule is other than that embodied in the instructions and explicitly stated by the district court on remand from us. But neither in the district court nor before this court has Andrews sought to evoke the plain error exception. We decline to do so in a case that went to trial in 1993.

The Evidence Of Fraud. The Pincay plaintiffs' testimony as to the Andrews defendants' misrepresentation supplied the jury with an ample basis for its special verdicts of fraud and of conduct warranting punitive damages. No California law insulates fraudsters from liability because they showered unread documents on their victims. As the jury not unreasonably read the evidence, the two superjockeys were the prey of sophisticated confidence men.

The Calculation Of Damages. Contrary to Andrews's contention, evidence of tax benefits is prohibited in calculating the cost of fraud. *Danzig v. Jack Grynberg & Assocs.*, 161 Cal. App. 3d 1128, 1139–1140 (1984). Pincay presented evidence that the investments at the time of trial were worthless; Andrews, that they had value; the jury verdict accepted Pincay's account. The post-trial life that the investments showed cannot be retrofitted to the jury verdict. As the district court held, Pincay presented sufficient evidence of Andrews's wealth to justify the punitives awarded; the Andrews defendants did not respond on this point to the Pincay supplemental briefing of the district court.

The judgment of the district court is AFFIRMED.

KLEINFELD, *Circuit Judge*, dissenting:

I dissent.

Pincay and McCarron sued the Andrews brothers and their firm, claiming that they had hired the Andrews to invest their money for a fee of 5% of their annual earnings, but that the defendants had charged more than that. The problem with their case is that the defendants told Pincay and McCarron, plainly and repeatedly, in writing, that the Andrews were indeed charging Pincay and McCarron more than 5% on some investments. But instead of firing Andrews and suing them forthwith, Pincay and McCarron waited at least nine more years after they were told before filing suit. Although California law clearly required Pincay and McCarron to sue, if at all, within three years of when they discovered the facts constituting the fraud or mistake,[1] they waited nine years. That long delay bars this suit.

It is odd indeed that the majority disposition attacks the *defendants* for delay, when most of it was caused by the plaintiffs' delay in bringing suit, and a substantial part of the rest was caused by our own error in declining to entertain this appeal where the district judge allowed it to be filed late.[2] The delay that matters—because it is the delay that controls whether the statute of limitations bars their claim—is the delay between when Pincay and McCarron had sufficient notice and the date that they actually filed suit.

The question of whether this suit is barred by the statute of limitations was answered affirmatively by our court's first decision in this case,[3] which specifically dealt with the RICO

---

[1] Cal. Civ. Proc. Code § 338(d).

[2] *See Pincay v. Andrews*, 351 F.3d 947 (9th Cir. 2003), *vacated*, 367 F.3d 1087 (9th Cir. 2004), and *superseded*, 389 F.3d 853 (9th Cir. 2004) (en banc).

[3] *Pincay v. Andrews ("Pincay I")*, 238 F.3d 1106 (9th Cir. 2001).

claims. In our 2001 decision, we held that the suit was barred by limitations because the defendants had plainly notified the plaintiffs, at least as early as 1980, that they were charging more than 5%.[4] We noted that Pincay and McCarron had both personally signed documents in 1980 stating that the Andrews would get another 5% out of an investment, on top of the 5% of earnings.[5] We considered whether fraudulent concealment tolled the statute of limitations, and held that it did not, because "[i]t is hard to imagine what would constitute 'enough information to warrant an investigation' if receiving a written disclosure of one's purported injury does not."[6]

The majority disposition incorrectly claims that the defendants are making a late attack on the jury instructions and findings. That is plainly wrong. There is no reason even to reach or consider the instructions.[7] The appellants' brief makes it crystal clear that they claim that they are entitled as a matter of law, under the doctrine of law of the case,[8] to have the limitations bar applied to the state law claims because the reasons for its applicability are indistinguishable from the reasons why we found it applied to the RICO claims in our earlier decision. And it is crystal clear that they are right.

Our reason for limiting our decision to the RICO claims in our previous decision was not because there was some difference in how the federal RICO statute of limitations applied when compared to the California statute of limitations for state fraud claims. Rather, in that decision we only had to decide the RICO claims because, at that point, the plaintiffs had elected to pursue only their RICO remedies, and no state

---

[4] *Id.* at 1110.

[5] *Id.*

[6] *Id.*

[7] *See id.* at 1109 n.4.

[8] *See United States v. Houser*, 804 F.2d 565, 567–68 (9th Cir. 1986).

law relief had been granted that could have been appealed. Whether the defendants fraudulently overcharged the plaintiffs for their investment services or not, our decision in the earlier case held that because the plaintiffs were given the plainest notice of the additional charges by 1980—charges that were not fraudulently concealed—defendants were entitled to judgment as a matter of law, in the face of a jury verdict to the contrary, that the claims brought in 1989 were barred by the statute of limitations.[9] These holdings control and cannot be distinguished from the state law claims now before us.

Almost all remedies for wrongs are restrained by statutes of limitations. Statutes of limitations are necessary to allow people to manage their affairs intelligently, to limit the degree to which the sins of the fathers are visited upon the sons, and to limit the degree to which trials become competitions of rhetoric and emotion where the facts have been lost in the mists of history. Even a fiduciary is entitled to close a file some years after the beneficiary has been informed of a charge higher than agreed to in the original contract. The majority's rhetoric about "fraudsters" and "sophisticated confidence men" has nothing to do with the statute of limitations issue that is before us. Even if the Andrews had been charged criminally and civilly with hitting Pincay and McCarron on their heads and stealing the money from their wallets as they lay unconscious on the ground, the charges would still have to be filed within the statute of limitations. An important aspect of the rule of law is that judges follow it, even if the outcome in the particular case leaves a bad taste in their mouths.

---

[9] *Pincay I*, 238 F.3d at 1110.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed July 1, 2002]

CV-89-1445-WMB

LAFFIT PINCAY, JR.,

Plaintiff,

v.

VINCENT S. ANDREWS; ROBERT L. ANDREWS;
VINCENT ANDREWS MANAGEMENT CORP.,

Defendants.

CV-89-4965-WMB

CHRISTOPHER J. MCCARRON,

Plaintiff,

v.

VINCENT S. ANDREWS; ROBERT L. ANDREWS;
VINCENT ANDREWS MANAGEMENT CORP.,

Defendants.

ORDER

These consolidated actions arose out of plaintiffs' claims of misconduct by their longtime business managers and financial advisors in connection with the investment of plaintiffs' funds in a series of limited partnerships. The case was tried to a jury, which returned special verdicts in favor of all plaintiffs' claims, including a federal RICO claim and state law claims for breach of contract, breach of fiduciary duty,

intentional misrepresentation, intentional concealment and negligent misrepresentation. On October 29, 1993, the Court entered judgment in favor of Laffit Pincay and Christopher McCarron on the RICO claim. Defendants Vincent Andrews, Jr., Robert L. Andrews, and Vincent Andrews Management Corp (VAMC) then moved for judgment as a matter of law or, alternatively, for a new trial. Before the Court ruled on the motion, the action was stayed pending defendants' bankruptcy proceedings. After the bankruptcy stays were lifted, the Court granted VAMC judgment as a matter of law on plaintiffs' RICO claim and denied defendants' motion in all other respects. Plaintiffs moved for reconsideration. The Court granted the motion for reconsideration and vacated the portion of the June 29, 1996 Order granting judgment as a matter of law. In the same Order, the Court denied defendants' motion for judgment as a matter of law and motion for a new trial as to Robert and Vincent Andrews. Finally, the Court ruled that the plaintiffs' prior election of remedies was not binding.

On December 5, 1997, the Court ordered the plaintiffs to again elect damages. Again, the plaintiffs elected RICO damages. On January 16, 1998, the Court entered a new judgment in favor of Pincay and McCarron on the RICO claim. Defendants appealed and the Ninth Circuit reversed. However, the court said that the "holding is limited to the civil RICO claims at issue on appeal and does not disturb the jury's verdict with regard to Pincay and McCarron's state law claims." *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001). The Supreme Court denied certiorari. *Pincay v. Andrews*, 122 S.Ct. 195 (2001).

Plaintiffs now move this Court to (1) enter judgment in favor of plaintiffs on the state law verdicts, (2) award them prejudgment interest pursuant to California law based on the verdicts for the breach of contract claims, (3) order that post judgment interest will accrue beginning October 29, 1993,

and (4) find that the plaintiffs are the "prevailing parties" for purposes of awarding costs pursuant to Rule 54(d). In a cross-motion–embedded within defendants' opposition to plaintiffs' motion–defendants move this Court to order a remittitur, reducing plaintiffs' damage awards by the amounts plaintiffs have earned from defendants' investments over the past 9 years.[1] For the reasons set forth herein, the Court grants plaintiffs' motion to enter judgment on the state law verdicts. The Court also awards plaintiffs pre-judgment interest, post-judgment interest, and costs. The Court denies defendants' request for a remittitur.

I. DISCUSSION

A. Plaintiffs' Motion for Entry of Judgment on State Law Verdicts

Plaintiffs contend that the Ninth Circuit opinion in *Pincay* left the state law verdicts undisturbed and that this Court can now enter a new judgment in favor of the plaintiffs on the state law verdicts. In opposition, defendants argue that the Ninth Circuit holding in *Pincay*—while expressly limited to the RICO claim—applies "a fortiori to Plaintiffs' state law claims" because "the standard for finding that a plaintiff suing a fiduciary is on inquiry notice is the same under state and federal law." (Defs.' Opp'n at 4). Defendants also insist–somewhat obliquely–that they "are not aware of any rule that permits Plaintiffs to seek an entirely new judgment now, nine years after the trial." (Defs.' Opp'n at 6). Plaintiffs respond that the standard for inquiry notice is different under California law than it is under federal law, and that *Pincay*

---

[1] Earlier, defendants moved to stay the proceedings while the case is mediated before a bankruptcy judge in Connecticut. As a result of the protracted, and unsuccessful, settlement discussions between November 2001 and March 2002, the motion to stay was effectively mooted. At the hearing on March 22, 2002 both sides agreed that the motion to stay was in fact moot.

thus does not reach the state law verdicts. Plaintiffs contend that this Court is able to conduct further proceedings in the case, including entering new judgments, despite the fact that the Ninth Circuit did not expressly remand the case.

1. "Jurisdiction"

Defendants raise two related concerns about the Court's power to enter new judgments on the state law verdicts. First, they question whether the Court can conduct further proceedings after the Ninth Circuit reversed on the RICO claim but did not remand the case. Second, they suggest that plaintiffs' earlier election of RICO remedies, and failure to include the state law verdicts in the original judgment, precludes the entry of a new judgment on these state law verdicts. Defendants cite no authority to support either one of these contentions. Both are meritless. As to the first, the decision in *Pincay* was an "open reversal" which "is also a remand to the district court to hear and to decide any issues heretofore or hereafter properly presented to the district court which [it] did not decide." *Heinicke Instruments v. Republic*, 543 F.2d 700, 703 (9th Cir. 1976); *see also Idaho First Nat. Bank v. C.I.R.*, 997 F.2d 1285, 1290 (9th Cir. 1993); *Rutter, 9th Circuit Practice Guide*, § 10:231 ("Reversal generally compels further proceedings in the district court, unless the appellate court orders entry of a particular judgment."). As to the second, this Court has repeatedly made clear that the election of remedies is a disfavored doctrine—and has ruled that plaintiffs' election of remedies was not binding. Although the case is now in a different posture, the Court's earlier ruling still applies. While the language of *Pincay* is somewhat ambiguous, it is best read to mean that the cross-appeal was "moot" because there was no longer anything to elect between anymore, and plaintiffs could proceed to effect judgment on their undisturbed state law verdicts. Based on the foregoing, it is clear this Court is empowered to enter a new judgment on the state law verdicts.

2. Application of *Pincay* to State law claims

Defendants argue that *Pincay* applies to plaintiffs' state law verdicts because "the standard for finding that a plaintiff suing a fiduciary is on inquiry notice is the same under state and federal law." (Defs.' Opp'n at 4). It is not. *Compare*, *Pincay*, 238 F.3d at 1110 ("'[p]laintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud.') (quoting *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988), *with Bennett v. Hibernia Bank*, 47 Cal.2d 540, 563 (Cal. 1956) ("[I]t is important to recognize the distinction between cases where a plaintiff is under a duty to inquire and those in which he has no such duty until he has notice of facts sufficient to arouse the suspicions of a reasonable man. Where there is no such duty, for example, because of the existence of a fiduciary relationship, a plaintiff need not disprove that an earlier discovery could have been made upon a diligent inquiry but need show only that he made an *actual discovery* of hitherto unknown information within the statutory period before filing the action.") (emphasis added); *see also Eisenbaum v. Western Energy Resources*, 218 Cal.App.3d 314, 325 (1990) (in a fiduciary relationship "the limitations period does not begin to run until plaintiff actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available."). Because the standard is not the same, *Pincay* does not, as defendants would have it, apply "a fortiori to Plaintiff's state law claims."[2]

Moreover, even if the statue of limitations did begin to run on plaintiffs' state law claims, it was tolled because of defendants'

---

[2] Even if the standard was the same, however, there is a difference between state and federal law as to what actually constitutes notice. *Compare Pincay*, 238 F.3d at 1110, and *Volk v. D.A. Davidson & Co.*, 816 F2d 1406 (9th Cir. 1987), with *Electronic Equipment Express v. Seiler*, 122 Cal.App.3d 834 (1981).

fraudulent concealment. In *Migliori v. Boeing North America*, 114 F.Supp.2d 976 (C.D. Cal. 2000), the court distinguished fraudulent concealment from the "discovery rule" as an independent bases [sic] for equitable tolling under California law. With fraudulent concealment, "the question is whether the plaintiff had knowledge of facts, or should have known about facts, that placed him or her on notice of the *specific cause of action*." *Id.* (emphasis added). Plaintiffs were not on such notice. In any event, this standard is clearly different than that enunciated in *Pincay*. *See Pincay*, 238 F.3d at 1110 ("Pincay and McCarron cannot prevail on their fraudulent concealment claim in this case because there is a long line of our cases holding that, in order to prevail on such a claim, plaintiffs must demonstrate that they had neither actual nor constructive notice of the facts constituting claims for relief.")

For these reasons, the Court finds that *Pincay* does not apply to plaintiffs' state law verdicts. Accordingly, the Court enters judgment for plaintiffs on these verdicts.

B. Remittitur

In their cross motion, the defendants ask the Court to order a remittitur. They argue that any new judgments should be reduced from the amounts awarded by the jury to reflect the "substantial cash distributions" that plaintiffs have received from the partnerships since the trial. These distributions total $721,054 for Pincay and $14,640 for McCarron. Defendants cite no authority for this request. The Court declines to disturb the verdicts of the jury on account of what has happened in the nearly nine years since those verdicts were returned.

C. Punitive Damages

Defendants also argue that "any new judgment should not include any award for punitive damages." (Defs' Opp'n at 8) It is unclear in what context defendants even raise this argument. It is not part of the noticed cross-motion, which refers only to the remittitur. For this reason alone, the Court rejects

defendants' request. In any case, even if the Court were to consider defendants' arguments, they would fail. First, they say that punitive damages are not available as a matter of law. Second, they say the plaintiffs' failure to offer evidence of defendants' wealth precludes any judgment for punitive damages. Both are meritless.

1. Punitive Damages as a Matter of Law

Defendants insist that "punitive damages are not recoverable in constructive fraud actions based on negligent representations, or for breach of contract, regardless of the circumstances." (Defs.' Opp'n at 9) (citing *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226 (1995); *Cates Construction, Inc. v. Talbot Partners*, 21 Cal.4th 28, 61 (1999)). The defendants provide no pin cite for *Alliance Mortgage*, so it is unclear precisely what they are referring to in this case. Presumably, it is where the court says, "[p]unitive damages are recoverable in those fraud actions involving intentional, but not negligent, misrepresentations." *Id.* at 1241. Here, the jury found the defendants liable for both negligent and intentional misrepresentation as well as intentional concealment. In any case, there is precedent in California for the award of punitive damages in constructive fraud cases. *See Stokes v. Henson*, 217 Cal.App.3d 187, 198 (1990).

2. Evidence of Wealth

Defendants also argue that the punitive damage award was disproportionately large, and untethered to the defendant's wealth. They contend: "Plaintiffs deliberate [sic] chose to make vague arguments to the jury about Defendants' wealth to support an award of punitive damages (and the damages awarded were, in fact, wildly disproportionate compared to Defendants' actual wealth)." (Defs.' Opp'n at 10). They cite nothing in any order of the Court or in the transcript of the trial, or in the papers of the plaintiffs—indeed they cite nothing at all—to support this allegation. The Court is satisfied,

based upon plaintiffs' supplemental briefing—to which defendants did not respond—that there was adequate discussion of defendants' financial condition at trial to support the jury's punitive damage awards.

D. Prejudgment Interest

Plaintiffs seek prejudgment interest on their breach of contract claim. Defendants filed no written opposition to this part of plaintiffs' motion. Accordingly, the Court awards prejudgment interest.

E. Postjudgment Interest

Plaintiffs also seek post judgment interest accruing from October 29, 1993. Defendants argue that under § 502(b)(2) of the Bankruptcy Code, all unmatured interested should cease to accrue at the moment defendants filed for bankruptcy on February 28, 1994. Although the court recognizes that the availability of postjudgment interest may be an issue before the bankruptcy court, it here awards postjudgment interest.

F. Costs

Finally, plaintiffs contend that they are the "prevailing parties" for purposes of "awarding costs under Rule 54(d). Defendants do not oppose this part of plaintiffs' motion. Accordingly, the Court awards plaintiffs costs.

V. CONCLUSION

For these reasons, the Court GRANTS plaintiffs' motion to enter judgment on the state law verdicts and awards plaintiffs prejudgment interest, postjudgment interest, and costs. The Court DENIES defendants cross-motion for a remittitur.

IT IS SO ORDERED.

Date: June 27, 2002

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jun. 30, 2005]

No. 02-56491
D.C. Nos. CV-89-01445-WMB, CV-89-04965-WMB
Central District of California, Los Angeles

LAFFIT PINCAY, JR.; CHRISTOPHER J. MCCARRON,
Plaintiffs-Appellees,

v.

VINCENT S. ANDREWS; ROBERT ANDREWS;
VINCENT ANDREWS MANAGEMENT CORP.,
Defendants-Appellants.

ORDER

Before: NOONAN, KLEINFELD, and WARDLAW, *Circuit Judges*.

In their petition for rehearing or for rehearing en banc, the Andrews defendants for the first time style their appeal as an appeal of a denial of a "Rule 50 motion for judgment as a matter of law on statute of limitations grounds." Unfortunately for the defendants, they did not make a Rule 50 motion after judgment was entered on the state law claims. Their motion "cannot be measured by [their] unexpressed intention or wants." *Johnson v. New York, N.H. and H.R. Co.*, 344 U.S. 48, 51 (1952).

Judges Noonan and Wardlaw vote to deny the petition for rehearing. Judge Wardlaw votes to deny the petition for rehearing en banc and Judge Noonan so recommends.

Judge Kleinfeld would grant the petition for rehearing and to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98–55217
98–55288
98–55449

D.C. No. CV-89-01445-WMB

LAFFIT PINCAY, JR.; CHRISTOPHER J. MCCARRON CORP.,
Plaintiffs-Appellees-
Cross-Appellants,

v.

VINCENT S. ANDREWS; ROBERT L. ANDREWS;
VINCENT ANDREWS MANAGEMENT CORP.,
Defendants-Appellants-
Cross-Appellees.,

Appeal from the United States District Court for the
Central District of California
William Matthew Byrne, Jr., Senior Judge, Presiding

Argued and Submitted
October 2, 2000—Pasadena, California

Filed February 6, 2001

OPINION

Before: DIARMUID F. O'SCANNLAIN, FERDINAND F. FERNANDEZ, and JOHNNIE B. RAWLINSON, *Circuit Judges.*

O'SCANNLAIN, *Circuit Judge*:

We must decide whether the civil Racketeer Influenced and Corrupt Organizations Act ("RICO") statute of limitations begins to run, as a matter of law, upon receipt of written disclosure of the alleged injury.

I

Lafitt [sic] Pincay and Christopher McCarron are professsional horse racing jockeys who have been inducted into the sport's Hall of Fame. Vincent Andrews ("Vincent"), Robert Andrews ("Robert"), and their company, Vincent Andrews Management Corporation ("VAMC") (collectively Andrews"), are investment advisors whom both Pincay and McCarron retained between 1969 and 1988.

Pincay began investing the earnings from his racehorse riding in 1967, when he orally employed Vincent's father, also named Vincent Andrews, to manage his financial affairs for a flat fee of 5% of his annual income. Pincay orally continued this arrangement in 1969, including the 5% flat fee, when Vincent took over his father's business and formed VAMC. In 1972, Vincent's brother, Robert, joined VAMC. Pincay's arrangement with VAMC called for the firm to handle Pincay's financial, accounting, and tax matters. McCarron orally entered into the same arrangement with VAMC, including the 5% flat fee, beginning in 1979. Pincay terminated his arrangement with VAMC in 1987 and McCarron did so in 1988.

Throughout their arrangements with VAMC, the firm recommended to Pincay and McCarron dozens of investment opportunities, and they partook in many of these. Many were ventures in which Robert, Vincent, or VAMC held a stake. For example, in some ventures the Andrews held a partnership interest, and in others they would be paid compensation based on the amount of capital invested in the venture. Many of these came with written disclosure of the Andrews' financial interest. For example, a document associated with one

venture, dated 1972 and signed by Pincay, binds Pincay to pay "Andrews & Co." 10% of the capital distribution of the venture. Another, dated 1984 and signed by McCarron, lists Andrews & Co., a "corporation controlled by Robert Andrews," as the managing partner of the venture. A similar document, dated 1984 and signed by Pincay, explains that the managing partner, listed as Andrews & Co. "controlled by Robert Andrews," will receive a management fee equal to a fraction of the amount invested in the venture. Perhaps the most explicit is a document, dated 1980 and signed each by Pincay and McCarron, which notes that Robert "will receive compensation from the [venture] . . . in the amount of five percent (5%) of the capital contributions to be paid by such investors."

In 1989, after they had terminated their arrangements, Pincay and McCarron sued the Andrews in the Federal District Court for the Central District of California. They alleged various state law claims, including breach of contract and breach of fiduciary duties, as well as mail and wire fraud violations of RICO. Their theory of RICO liability argued that the Andrews had committed mail and wire fraud by taking, in violation of their oral agreements, more than 5% of their annual income, in the form of the payments the Andrews additionally received from the ventures in which they invested. The jury returned verdicts on both the state and RICO claims against Vincent, Robert, and VAMC. The jury found that Pincay would not have invested in 29 ventures, and McCarron would not have invested in 13 ventures, but for the Andrews' unlawful conduct. The jury awarded Pincay $670,685 and McCarron $313,000 in compensatory damages for their state and RICO claims. Pincay also received $2.25 million, and McCarron roughly $1.3 million, in punitive damages for the state law violations. The district court awarded Pincay $603,967 and McCarron $255,986 in attorneys fees under RICO. At the court's behest, Pincay and McCarron elected to treble their compensatory damages under RICO in

lieu of the compensatory and punitive damages available under state law.

The Andrews filed a renewed motion for judgment as a matter of law and a motion for a new trial, in which they argued that the statute of limitations had run and that there was insufficient evidence both to support a RICO claim and to support the amount of damages awarded. The district court denied these motions. The Andrews filed a timely notice of appeal and argue that their motions were improperly denied. Pincay and McCarron filed a timely notice of cross-appeal and argue that they should not have been forced to elect either RICO treble damages or state law punitive damages. The appeals were consolidated before this court.

II

We first address the Andrews' argument that the statute of limitations had run prior to the time Pincay and McCarron filed their suits in 1989.[1] The jury concluded that the statute of limitations had not run.

The statute of limitations for civil RICO actions is four years.[2] *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). Pincay entered into the agreement for investment management services with VAMC in 1969 and McCarron did so in 1979. Pincay and McCarron

---

[1] The Andrews argued that, as a threshold matter, Pincay and McCarron's RICO claims were precluded by retroactive application of a provision of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub L. No. 104–67, § 107, 109 Stat. 737, 1758 (1995). We recently concluded, however, that this provision cannot be applied retroactively. *See Scott v. Boos*, 215 F.3d 940, 942–49 (9th Cir. 2000).

[2] For some reason, the jury was instructed that the statute of limitations was three years, rather than four years. This error does not matter for this appeal, however, because the jury's conclusion that a three-year statute of limitations did not run means that *a fortori* it would have concluded that the four-year statute of limitations had not run.

invested in ventures from which the Andrews stood to make a profit throughout the 1970s and 1980s. Yet, Pincay and McCarron did not file their suits until 1989.

We have continuously followed the "injury discovery" statute of limitations rule for civil RICO claims. *See Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996).[3] Under this rule, "the civil RICO limitations period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Id.* at 510 (internal quotation marks omitted). Thus, the "injury discovery" rule creates a disjunctive two-prong test of actual or constructive notice, under which the statute begins *running* under either prong.

The plaintiffs argue, and the district court held, that in cases, such as this one, where the injurer and the injured were in a fiduciary relationship with one another, constructive notice does not begin to run the statute of limitations. There is no support for this contention in our cases. In *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406 (9th Cir. 1987), we affirmed summary judgment against RICO plaintiffs on the ground of constructive notice even though the defendants owed the plaintiffs a fiduciary duty. The defendant responsible for sending the plaintiffs written disclosure of their injury in that case was the general partner of the ventures in which the plaintiffs were limited partners, *see id.* at 1409. Under the mid-1970's Montana law applicable in *Volk* (as with the laws of most states), these partners owed one another certain fiduciary duties. *See* Mont. Code Ann. §§ 35–10–401, 402–

---

[3] Although the Supreme Court has overruled other statute of limitations standards for civil RICO, *see Rotella v. Wood* , 120 S.Ct. 1075, 1080 (2000) (overruling the "injury and pattern discovery rule" of the Sixth, Eighth, Tenth, and Eleventh Circuits); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (overruling the Third Circuit's "last predicate act" rule), it has left our "injury discovery" rule intact. It is important to note, however, that the Supreme Court has explicitly reserved the question of whether our standard is correct. *See Rotella*, 120 S.Ct. at 1080 n.2.

405 (1991); *Arnold v. Cremer*, 515 P.2d 957, 960 (Mont. 1973) (recognizing "rules of law" that partners owe each other fiduciary duties).

The only case cited by Pincay and McCarron here and by the District Court in its opinion and order to support the view that constructive notice does not commence the statute of limitations is a non-RICO decision, *Conmar Corp. v. Mitsui & Co., Inc.*, 858 F.2d 499 (9th Cir. 1988). The relied upon language from *Conmar* reads: "Passive concealment of information is not enough to toll the statute of limitations, unless the defendant had a fiduciary duty to disclose information to the plaintiff." *Id.* at 505 (internal citations omitted). This language, however, is inapposite to the case at hand because the distinction made in *Conmar* between fiduciary relationships and non-fiduciary relationships was with regard to the doctrine of fraudulent concealment, not the doctrine of constructive notice. Although fraudulent concealment may *toll* the statute of limitations, a question we confront below, that does not settle the question of when the statute of limitations *began to run*. The two questions are analytically distinct. *See Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 276 (9th Cir. 1988).

We reaffirm the holding in *Volk* that constructive notice begins to run the statute of limitations regardless of any fiduciary relationship between the injured and the injurer. Thus, if no reasonable jury could find that Pincay and McCarron did not have constructive notice of their injuries before 1985, the Andrews are entitled to judgment as a matter of law.[4]

---

[4] Pincay and McCarron note that, even if constructive notice could begin to run the statute of limitations in this case, the jury was instructed otherwise and the Andrews failed to object to the instruction. This, however, does not prevent us from reversing the district court's denial of judgment as a matter of law to the Andrews on this ground because, when reviewing a motion for judgment as a matter of law, we apply the law as it should be, rather than the law as it was read to the jury.

The injury alleged by Pincay and McCarron was the act of paying more than 5% of their yearly income to the Andrews. "The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud." *Beneficial Standard Life Ins. Co.*, 851 F.2d at 275. It is hard to imagine what would constitute "enough information to warrant an investigation" if receiving a written disclosure of one's purported injury does not. As just one example of the many instances in which Pincay and McCarron received written disclosure of their injury, Pincay and McCarron both signed a document in 1980 disclosing that Robert "will receive compensation from the [venture] . . . in the amount of five percent (5%) of the capital contributions to be paid by such investors." Clearly, as of 1980, both Pincay and McCarron had "enough information to warrant an investigation" into whether the ventures in which they were investing would result in more than 5% of their annual income finding its way into the wallets of the Andrews. Indeed, in *Volk*, we held, as a matter of law, that receiving written disclosure of the possibility of injury was sufficient to put a civil RICO plaintiff on constructive notice of his injury. *See Volk*, 816 F.2d at 1412, 1414–15 (affirming summary judgment for defendants on statute of limitations grounds because the plaintiffs were placed on inquiry notice upon "their receipt of the 1978 annual report and the general partner's September 1979 letter"). We follow *Volk* and hold that, as a matter of law, Pincay and McCarron received constructive notice of their injuries at least as early as 1980. Thus, unless the statute of limitations was tolled, Pincay and McCarron's civil RICO claims are time-barred as a matter of law and the Andrews are entitled to judgment as a matter of law.

See Air-Sea Forwarders, Inc., v. Air Asia Co., Ltd., 880 F.2d 176, 183–83 (9th Cir. 1989).

III

Pincay and McCarron claim that even if the statute of limitations began to run prior to 1985, the statute was tolled until 1988 because the Andrews "fraudulently concealed" information that prevented them from learning of the fraud. "Equitable tolling doctrines, including fraudulent concealment, apply in civil RICO cases." *Grimmett*, 75 F.3d at 514. "The doctrine is properly invoked only if a plaintiff establishes affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Volk*, 816 F.2d at 1415 (internal quotation marks omitted).

Pincay and McCarron cannot prevail on their fraudulent concealment claim in this case because there is a long line of our cases holding that, in order to prevail on such a claim, plaintiffs "must demonstrate that they had *neither actual nor constructive notice* of the facts constituting their claims for relief." *Volk*, 816 F.2d at 1415 (emphasis added); *accord Grimmett*, 75 F.3d at 514–515 (citing cases). As we decided above, Pincay and McCarron had constructive notice of their injuries prior to 1985 as a matter of law. Thus, they cannot prevail on their fraudulent concealment claim.

IV

Because we conclude that the statute of limitations had run as a matter of law prior to 1989, we need not reach the remaining issues raised by the Andrews regarding the sufficiency of the evidence. Moreover, given that we conclude that their RICO claims were untimely, Pincay and McCarron's cross-appeal raising the issue of election of damages is moot. Finally, our holding is limited to the civil RICO claims at issue on appeal and does not disturb the jury's verdict with regard to Pincay and McCarron's state law claims. Judgment for Pincay and McCarron is REVERSED.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 89–1445 WMB (TX)
Consolidated with
No. 89–4965 WMB (TX)

LAFFIT PINCAY, JR.,

Plaintiff,

v.

VINCENT S. ANDREWS, *et al.*,

Defendants.

CHRISTOPHER J. MCCARRON,

Plaintiff,

v.

VINCENT S. ANDREWS, *et al.*,

Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT AND DEFENDANTS CROSS-MOTION FOR STAY, OR IN THE ALTERNATIVE REMITTITUR

DAVID BOIES
ANDREW W. HAYES
(Pro hac vice)
BOIES, SCHILLER & FLEXNER L.L.P.
80 Business Park Drive
Armonk, New York 10504
(914) 273-9800 (Telephone)
(914) 273-9810 (Facsimile)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Preliminary Statement

Nine years after trial, and while mediating their claims in bankruptcy court, Plaintiffs now seek entry of an entirely new judgment, with interest. If the Court were to consider Plaintiffs' motion on its merits, it should be denied as procedurally defective, contrary to the Ninth Circuit's findings and the Bankruptcy Code, and subject to remittitur to reflect the cash distributions Plaintiffs have received since trial. But, we respectfully submit, considerations of judicial economy and the bankruptcy court process should lead the Court to stay any further action and direct Plaintiffs to pursue their claims in the bankruptcy court that has jurisdiction over Defendants' estates.

Consistently refusing to engage in realistic settlement talks, Plaintiffs chose instead to press their RICO claims, even to the exclusion of their state law claims. That gambit failed earlier this year, when the Ninth Circuit held that the written disclosures of Defendants' interests in the partnerships put Plaintiffs on inquiry notice of their RICO claims by *at least 1980.* Indeed, the Ninth Circuit held that it would be "hard to imagine a clearer case" of inquiry notice. *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001). The Ninth Circuit vacated this Court's October 19, 1993 judgment, and did *not* remand the action.

Earlier this year, the parties agreed to mediate their claims in the Bankruptcy Court for the District of Connecticut, which has had jurisdiction over Defendants' estates since Defendants filed for Chapter 11 in February 1994. The parties submitted mediation briefs in September. After the bankruptcy court expressed skepticism over whether any of Plaintiffs' claims survived the Ninth Circuit's decision, Plaintiffs decided to start the process all over again in this Court, by filing a motion to enter a brand-new judgment. Since any decision on this motion would be subject to further appeals and proceedings in the bankruptcy court, it should be clear to

all that no useful purpose is served by hearing Plaintiffs' motion, and the Court should instead direct Plaintiffs to continue the mediation and pursue their claims in the bankruptcy court.

Argument

I. THE COURT SHOULD STAY ANY FURTHER PROCEEDINGS IN FAVOR OF PROCEEDINGS BEFORE THE BANKRUPTCY COURT

The Court has inherent power to stay its proceedings. *See Landis v. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 166 (1936) (power to stay proceedings comes from the power of every court to manage the cases on its docket and to ensure a fair and efficient adjudication of the matter at hand), *cited with approval in Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997). To determine whether to grant a stay, courts generally consider three factors: (1) the potential prejudice to the non-moving party; (2) hardship and inequity to the moving party if the action is not stayed; and (3) conservation of judicial resources.[1] *See Rivers*, 980 F. Supp at 1360.

Here, there can be no prejudice to Plaintiffs, since they are already pursuing essentially the same issues in the bankruptcy court mediation, and any substantive ruling by this Court would be subject to appeal and to further proceedings in the bankruptcy court. By contrast, Plaintiffs' effort to argue issues that are also before the bankruptcy court is a hardship to the Defendants' estates, and considerations of judicial economy overwhelmingly favor a stay that will allow the

---

[1] Other factors that other courts have looked at include: (1) the likelihood that the declaration will resolve the uncertainty of obligation which gave rise to the controversy; (2) the public interest in the settlement of the uncertainty; and (3) the availability and convenience of other remedies. *See M.D. Sass Investors Services, Inc. v. Reliance Ins. Co. of Illinois*, 810 F. Supp. 1082, 1089 (N.D. Cal. 1992).

bankruptcy court to finally resolve the remaining issues in this case.

Although proceedings herein were automatically stayed when Defendants filed for Chapter 11, that stay was lifted some years ago to permit resolution of post-trial motions and appeals therefrom. Now that the Ninth Circuit has spoken, this Court can, and should, stay further proceedings so that the bankruptcy process can move forward to a prompt resolution.

The inappropriate, end-run nature of Plaintiffs' motion is reflected in their failure to "meet and confer" prior to filing the motion, as required by Local Rule 7-3.[2] Plaintiffs claim to have complied with this rule, referring to a conference almost six months prior to the motion, on April 25, 2001 (*see* Motion at 2)—but that conference did not involve a thorough discussion of "the substance of the contemplated motion," as required. In fact, *after* April 25th, Plaintiffs told the bankruptcy court that they intended to mediate whether the Ninth Circuit's findings regarding Plaintiffs' inquiry notice preclude Plaintiffs' state law claims, and whether the state law claims, if not time barred, are non-dischargeable.[3] This Court should reject Plaintiffs' efforts to argue those issues at the same time in two different courts.

II. THE PROPOSED JUDGMENT IS CONTRARY TO THE NINTH CIRCUIT'S HOLDING, AS A MATTER OF LAW, THAT PLAINTIFFS HAD INQUIRY NOTICE OF THE FACTS UNDERLYING THEIR CLAIMS BY 1980

If the Court were to entertain Plaintiffs' motion on the merits, it should be denied, because the Ninth Circuit's hold-

---

[2] Local Rule 7-3 has been in effect since October 1, 2001.

[3] *See* Statement of Position of Laffit Pincay and Christopher McCarron in Connection With Mediation, Ex. A.

ing as a matter of law that Plaintiffs were on inquiry notice of the facts underlying their claims by 1980 is fatal to *all* of Plaintiffs' state law claims.

Plaintiffs' theory at trial was that Defendants had undisclosed interests in various partnerships in which Plaintiffs invested while they were clients of Vincent Andrews Management Corporation ("VMAC") (Pincay became a client of VMAC in 1969, McCarron in 1977). As the facts relating to those claims (both state *and* federal) predated the relevant statutes of limitations, Plaintiffs had the burden of proof that their claims were not time-barred. Plaintiffs sought to meet that burden through the doctrine of fiduciary tolling, claiming that their fiduciary relationship with Defendants relieved them of any duty to inquire until the fiduciary relationship ended. Defendants claimed that fiduciary tolling did not apply here because the written disclosures that Plaintiffs admitted receiving over the years disclosed the allegedly concealed facts, or at least put Plaintiffs on notice of their potential claims.

The jury found in Plaintiffs' favor on this issue, but the Ninth Circuit recently rejected those findings as a matter of law, holding that it was "hard to imagine" a clearer case in which plaintiffs had notice of the facts underlying their claims. 238 F.3d at 1110; *see also id.* at 1109 *(citing Volk v. D.A. Davidson & Co.*, 816 F.2d 1406 (9th Cir. 1987) ("constructive notice begins to run the statute of limitations regardless of any fiduciary relationship between the injured and the injurer."). And while this holding specifically addressed only Plaintiffs' RICO claims—those being the only claims before the court—the holding applies a *fortiori* to Plaintiffs' state law claims, since under California law, inquiry notice precludes any reliance on the doctrine of fiduciary tolling. *See Electronic Equip. Express v. Donald H. Seiler & Co.*, 122 Cal.App.3d 834, 856, 176 Cal.Rptr. 239, 252 (1981) (where a fiduciary relationship exists, the statute of limitations begins

to run when plaintiff discovers, or through the use of reasonably diligence should discover the harmful act). In short, the standard for finding that a plaintiff suing a fiduciary is on inquiry notice is the same under state and federal law. *Compare Pincay*, 238 F.3d at 1110 ("'plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud.'") (quoting *Beneficial Standard Life Ins. Co., v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988)) *with Bennett v. The Hibernia Bank*, 47 Cal. 2d 540, 563 (Cal. 1956).

Nor was this result a close call: noting that Plaintiffs received many documents in connection with their investments disclosing the interest of Vincent Andrews, Robert Andrews, or their respective companies in the first paragraph,[4] and signed numerous disclosure forms acknowledging and consenting to Defendants' compensation,[5] the Ninth Circuit was emphatic that Plaintiffs had constructive notice of their injuries by at least 1980:

> *It is hard to imagine what would constitute "enough information to warrant an investigation" if receiving a written disclosure of one's purported injury does not.* As just one example of the many instances in which Pincay and McCarron received written disclosure of their injury, Pincay and McCarron both signed a document in 1980 disclosing that Robert "will receive compensation from the [venture] . . . in the amount of five percent (5%) of the capital contributions to be paid by such investors.[6] Clearly, *as of 1980, both Pincay and McCarron had "enough information to warrant an investigation" into whether the ventures in which they were investing would*

---

[4] *See* Ex. B (EXC197, 201, 210, 212, 218, 224, 226).

[5] *See* Ex. C (EXC222, 223).

[6] The document to which the court referred is attached as Exhibit D.

> *result in more than 5% of their annual income finding its way into the wallets of the Andrews.* Indeed, in *Volk*, we held, as a matter of law, that receiving written disclosure of the possibility of injury was sufficient to put a civil RICO plaintiff on constructive notice of his injury. *See Volk*, 816 F.2d at 1412, 1414–15.

Id. (emphasis and footnote added).

In addition to these facts, the evidence at trial also showed that Pincay admitted he had invested in various partnerships[7] to obtain tax deductions, and knew that Vincent Andrews was involved in at least some of these partnerships.[8] And McCarron's admissions of inquiry notice were even clearer; McCarron

- admitted it was his standard practice to try to read documents from VAMC;
- admitted knowing Andrews' involvement in at least some of the partnerships, and twice chose not to invest based on his view of risk—not because Andrews was involved; and
- admitted that he read and signed acknowledgement forms—some of which referred to amounts other than 5%—even after he had raised questions about Andrews' compensation as disclosed on one form.

Since Defendants' alleged failure to disclose their interests also formed the basis of Plaintiffs' state law claims, those claims are also necessarily time-barred. Plaintiffs' claims of breach of contract, breach of fiduciary duty, intentional misrepresentation, intentional concealment, and negligent misrepresentation all rest upon the assertion that Defendants did not provide Plaintiffs with adequate disclosure. The Ninth

---

[7] *See* Ex. E (EXC173, 195, 204, 206, 221, 224, 226).

[8] *See* Ex. F (EXC81, 98).

Circuit's holding that Defendants disclosed their interests sufficiently to trigger inquiry notice by at least 1980 renders Plaintiffs' other claims untimely under the applicable statute of limitations (Pincay did not sue until 1987, and McCarron sued in 1988).

III. THERE IS NO BASIS FOR PLAINTIFFS' PROPOSED NEW JUDGMENT TO BE ENTERED NOW, PARTICULARLY AFTER THE NINTH CIRCUIT CHOSE NOT TO REMAND THE ACTION TO THIS COURT

Even if Plaintiffs' claims were not precluded as a matter of law, we are not aware of any rule that permits Plaintiffs to seek an entirely new judgment now, nine years after the trial. While Plaintiffs were required to choose between their RICO damages or state law damages in calculating the amount of the judgment, Plaintiffs went a step further, and deliberately excluded their state law claims from the judgment, even as an alternate basis for recovery of the actual damages set forth in the judgment. It is too late now for Plaintiffs to start the post-trial process all over again with a brand new judgment.

Plaintiffs' first motion for entry of judgment (which they drafted) included only their RICO causes of action. (*See* 1993 Proposed Judgment, Ex. G.) That was their choice: this Court's ruling that Plaintiffs could not recover both RICO treble damages and state-law punitive damages did not require Plaintiffs to completely omit their state law claims from the judgment. (If that were the case, then a plaintiff who prevailed on multiple theories of liability for the same wrong would have to choose one claim for his or her judgment, leaving the others for later proceedings—yet even Plaintiffs' new judgment includes all their state law claims together.)

Plaintiffs' strategy apparently was to keep the state law claims in reserve, as an insurance policy in case the RICO claims were dismissed. We do not think that is an appropriate strategy, and we are not aware of any rule that would allow

Plaintiffs to do what they now seek to do, and—perhaps most tellingly—the Ninth Circuit, quite aware that Plaintiffs had chosen to enter a judgment solely on their RICO claims, simply vacated the judgment *without* remanding this action to this Court for any further proceedings.

IV. ANY NEW JUDGMENT SHOULD BE SUBJECT TO REMITTITUR TO REFLECT PLAINTIFFS' POST-VERDICT DISTRIBUTIONS

Where money damages awarded by a jury are excessive and unreasonable, the court has the power to order a remittitur and if plaintiff does not agree to the remittitur, a new trial.[9] *See Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965) *affd*, 385 U.S. 811 (1967); *Minthorne v. Seeburg Corp.*, 397 F.2d 237 (9th Cir. 1968); *Anglo-American General Agents v. Jackson Nat'l Life Ins. Co.*, 83 F.R.D. 41 (N.D. Ca. 1979).

It has been accepted by all parties and the Court that the jury's damage award was based on Plaintiffs' net cash investments in the partnerships, based on the evidence at the time of trial.[10] The jury flatly rejected Defendants' testimony that the Plaintiffs' remaining interests in the partnerships had any value. Nevertheless, the partnerships have continued to generate cash for the Plaintiffs, Pincay in particular. The fact of those cash distributions cannot seriously be disputed: as noted in the Affidavit of Vincent Andrews submitted herewith, the distributions are documented in K1 partnership reports, gen-

---

[9] The practice of remittur, whereby the plaintiff remits a portion of the damages award, goes as far back as 1822. *See Blunt v. Little*, 3. Fed.Cas. 760 (C.C.D. Mass. 1822) (Story, J.).

[10] *See* Ex. H (EXC280–81). Plaintiffs contended, and the jury apparently concluded, that Plaintiffs' remaining partnership investments were worthless, and the Court precluded evidence of any tax benefits that may have accrued as a result of the investments ($1,191,725 for Pincay and $768,411 for McCarron, according to Defendants' offer of proof).

erated by the partnerships and filed by the Plaintiffs, as taxpayers, with the IRS.

Accordingly, if the Court is to enter a new judgment now, Defendants respectfully cross-move for remittitur, so that any new judgments be reduced from the amounts awarded by the jury to reflect the substantial cash distributions that Plaintiffs have received from the partnerships since the trial: more than $721,054 for Pincay, and over $14,640 for McCarron. (*See* the Affidavit of Vincent Andrews, submitted herewith in support of this cross-motion.).

V. PLAINTIFFS' PUNITIVE DAMAGES CLAIMS ALSO FAIL AS A MATTER OF LAW

There are two separate and distinct reasons why any new judgment should not include any award for punitive damages.

A. *The Ninth Circuit's Findings of Notice Preclude any Punitive Damages*

Even if the Court were to find that the Ninth Circuit's decision was not dispositive of Plaintiffs' state law claims, that decision should at least preclude any award of punitive damages under state law. California Civil Code section 3294(a) permits the recovery of punitive damage; in a tort action only if plaintiff has "proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."[11] Bad faith alone is insufficient. *See Shade*

---

[11] Section 3294 (c) defines the relevant terms in the following manner:

(1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the inten-

Foods, Inc. v. Innovative Products Sales & Marketing, Inc., 78 Cal.App.4th 847, 890–91, 93 Cal.Rptr.2d 364, 394 (2000). And punitive damages are *not* recoverable in constructive fraud actions based on negligent misrepresentations, or for a breach of contract, regardless of the circumstances. *See Alliance Mortgage Co. v. Rothwell*, 44 Cal.Rptr.2d 352, 10 Cal.4th 1226 (1995); *Cates Construction, Inc. v. Talbot Partners*, 21 Cal.4th 28, 61, 980 P.2d 407, 427, 86 Cal.Rptr.2d 855, 878 (1999) ("In the absence of an independent tort, punitive damages may not be awarded for breach of contract 'even where the defendant's conduct in breaching the contract was willful, fraudulent, or malicious.'") (quoting *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503, 516, 28 Cal.Rptr.2d 475, 869 P.2d 454 (1994)).

As noted, the Ninth Circuit has held as a matter of law that Defendants provided sufficient written disclosures of their interests in the partnerships by at least 1980. Putting aside statute of limitations questions, that disclosure vitiates any claim that Defendants engaged in the requisite intentional misconduct that California law requires to support an award of punitive damages, and any new judgment should not include any such award.

B. *Plaintiffs' Failure to Provide Evidence of Defendants' Wealth also Precludes any Judgment for Punitive Damages*

"A punitive damage award is uniquely justified by and proportioned to the actor's particular reprehensible conduct as

---

tion on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

"The requirement of 'despicable' conduct represents a substantive limitation on punitive damage awards. Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.'" *College Hospital Inc. v. Superior Court*, 8 Cal.4th 704, 725, 34 Cal.Rptr.2d 898, 882 P.2d 894 (1994) (internal quotations and citation omitted).

well as that person or entity's net worth; in order to adequately make the award 'sting,' the jury is required to take such matters into consideration." *Piscitelli v. Friedenberg*, 87 Cal.App.4th 953, 981–82, 105 Cal.Rptr.2d 88, 108 (2001) (citing Civ.Code, § 3294 (a) and *Adams v. Murakami*, 54 Cal.3d 105, 123, 284 Cal.Rptr. 318 (1991) (plaintiff must prove a defendant's wealth before punitive damages can be imposed)).[12]

Here, Plaintiffs deliberate [sic] chose to make vague arguments to the jury about Defendants' wealth, without entering into the record sufficient evidence concerning Defendants' wealth to support an award of punitive damages (and the damages awarded were, in fact, wildly disproportionate compared to Defendants' actual wealth). Cf. *Rufo v. Simpson*, 86 Cal.App.4th 573, 625, 103 Cal.Rptr.2d 492, 529 (2001) ("The fundamental underlying principle is that punitive damages must not be so large they destroy the defendant."). Thus, as a matter of California law, there is insufficient evidence to support any award of punitive damages as part of any new judgments.

VI. UNDER ANY CIRCUMSTANCES, THE BANKRUPTCY CODE BARS PLAINTIFFS FROM RECOVERING INTEREST ON ANY CLAIMS FROM FEBRUARY 28, 1994 ONWARD

Finally, and separate and apart from everything else in this motion, Plaintiffs' request for a judgment that includes interest for the entire post judgment period ignores the plain language of §502(b)(2) of the Bankruptcy Code ("§502(b)(2)") and the relevant case law and must be rejected.

---

[12] *See also Michelson v. Hamada*, 29 Cal.App.4th 1566, 1596, 36 Cal.Rptr.2d 343 (1994) (punitive damages of 28 percent of net worth found excessive); *Storage Services v. Oosterbaan*, 214 Cal.App.3d 498, 515–516, 262 Cal.Rptr. 689 (1989) (punitive damages of 33 percent of net worth found excessive).

On February 28, 1994, Defendants filed petitions for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code. At that moment, according to §502(b)(2), all unmatured interest should cease to accrue. *See* 11 U.S.C. §502(b)(2); *see also In the matter of Fesco Plastics Corporation, Inc.*, 966 F.2d 152, 156 (7th Cir. 1993) ("the cases in §502(b)(2), however, make it clear that interest stops accruing when the petition is filed.") (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 246, 109 S.Ct. 1026, 1033 (1989); 2 Collier on Bankruptcy, ¶ 502.02(2) at 502–30 (Lawrence P. King ed., 15th ed. 1993).

Thus, if Plaintiffs should be awarded damages, the interest on those damages must be limited to interest accrued on or before February 28, 1994.

Conclusion

For the reasons set forth above, the Court should stay the motion and all further proceedings in this Court; alternately, the motion should be denied.

Armonk, New York
November 4, 2001

Respectfully submitted,

David Boies
Andrew W. Hayes
BOIES, SCHILLER & FLEXNER LLP

By: Andrew W. Hayes
ANDREW W. HAYES
Counsel for Defendants

APPENDIX F

RULES OF CIVIL PROCEDURE

Rule 7. Pleadings Allowed; Form of Motions

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983.)

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995.)

2

No. 05-421

In The

Supreme Court of the United States

VINCENT S. ANDREWS, ROBERT L. ANDREWS and VINCENT ANDREWS MANAGEMENT CORP.,

Petitioners,

v.

LAFFIT PINCAY, JR. and CHRISTOPHER J. MCCARRON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand Avenue, 27th Floor
Los Angeles, California 90017
(213) 624-7444
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RESPONDENTS' BRIEF IN OPPOSITION

Plaintiffs/Respondents Laffit Pincay, Jr. and Christopher J. McCarron submit this Brief in Opposition in response to the Petition for a Writ of Certiorari filed by Defendants/Petitioners Vincent S. Andrews, Robert L. Andrews and Vincent Andrews Management Corporation.

INTRODUCTION

This case does not merit the Court's review. No matter what the Court decides in *Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, No. 04-597, the decision there will not change the Ninth Circuit's holding to affirm the judgment of the district court under California law. (Petition's Appendix ("Pet.App.") 1a-4a.) Accordingly, no basis exists for the Court to postpone this case pending resolution of *Unitherm*.

The Ninth Circuit's holding rests on California law and substantial evidence:

> Applying state law . . . we recite the facts relevant to our decision. . . . The [respondents] testified that relying on the [petitioners'] assurances and not reading the documents tendered them, they did not discover the facts constituting their claim until after 1986. . . . As the jury not unreasonably read the evidence, the [respondents] were the prey of sophisticated confidence men. . . . The judgment of the district court is AFFIRMED.

(Pet.App. 2a-4a.) The record clearly supports the Ninth Circuit's holding.

STATEMENT OF THE CASE

Respondent Pincay, Jr., a native Spanish speaker, was born in Panama City, Panama (Supplemental Excerpts of Record ("SER"), Volume 0117, 0134), where he attended school only until the ninth grade. (1 SER 0118.) Petitioners knew Pincay's occupation as a professional thoroughbred jockey was rigorous, dangerous and demanded Pincay's full attention. (1 SER 0133-0134.) Petitioners were experts in business management and held themselves out as possessing special skills, knowledge and character that made them particularly able to manage all of Pincay's business affairs. (1 SER 0131:11-16.)

Petitioners would (a) telephone Pincay at home, and say to him, for example, "I want to put your money in this [usually a hotel or shopping center]. . . ." (Excerpts of Record ("ER") 086; 1 SER 0140:10-15), then (b) tell Pincay to send a check, or that the petitioners would send somebody with a check for Pincay to sign the next day or the next couple of days, then (c) one or two weeks later Pincay would receive, through the mail from petitioners' New York office, the large memorandum or prospectus describing the proposed investment. (ER 088; 1 SER 0141.) Sometimes Pincay did not receive documents at all. (1 SER 0147.)

After Pincay received the first prospectus, the petitioners told Pincay that (a) the petitioners understood the document, (b) the petitioners had already read it, (c) everything was acceptable with the document, (d) Pincay

had hired the petitioners to understand the document, and (e) the petitioners would never put Pincay in any investment that would hurt him. (1 SER 0141-0142.)

Pincay unqualifiedly trusted and relied on the petitioners. (1 SER 0132, 0145-0146, 0402.) The petitioners, however, concealed that they were recommending or presenting investments to Pincay in which the petitioners had interests that would cause Pincay to pay money to the petitioners well beyond the five percent Pincay agreed to pay for all the petitioners' services. (ER 088, 093-094; 1 SER 0141-0144, 0145-0151, 0160-0161.) The petitioners never offered to explain any of the investment documents to Pincay. They simply sent the documents showing where to sign. (1 SER 0145, 0161.) The petitioners never recommended that Pincay seek independent advice. (1 SER 0142-0143, 0153:21-24.) They concealed the total amount of money they received from the ventures in which Pincay placed his money. (1 SER 0398-0400.) Pincay terminated the petitioners in 1987. (1 SER 0131.) He filed this action in 1989.

Respondent McCarron had only a high school education. (1 SER 0166-0167.) The petitioners knew McCarron's occupation as a professional thoroughbred jockey was rigorous, dangerous and demanded his full attention. (1 SER 0133-0134.) The petitioners unilaterally determined whether they would present a particular investment opportunity or partnership to McCarron. (1 SER 0134:17-20.) The petitioners would, in turn, present the investment to McCarron on the phone. (1 SER 0179, 0201, 0268.) In the phone calls, the petitioners would describe the investment generally. Petitioners represented that they had fully researched the proposed "investment," and that they advised very strongly to invest. (1 SER 0179, 0183-0184.) The phone call always came before McCarron received

documents for the investment. (1 SER 0188.) The check prepared for McCarron's signature always came either the next day or two after the phone call. (1 SER 0188-0189.) McCarron would sign the check, send it back and later he would receive the documents for the investment. (1 SER 0201-0210.) Often the check came by messenger to McCarron's house and McCarron signed the check and gave it back to the messenger. (1 SER 0254.) The petitioners' scheme also involved their telling McCarron to sign documents that had not been completed. (1 SER 0206-0209, 0254-0255.) The petitioners did not ask McCarron to date any of the documents, and petitioners would often fill in the dates later. (1 SER 0282-0285.)

The petitioners always urged McCarron to sign quickly because the deals were just "hot deals." (1 SER 0192, 0195, 0269.) McCarron was already in before he even saw the agreement for the investment. (1 SER 0201, 0260-0261, 0265-0266.) When documents did arrive, McCarron simply signed where the arrow was pointing. (1 SER 0259.)

The petitioners told McCarron that (a) he had paid the petitioners to read and understand the documents, and (b) the petitioners were the experts in the field, while McCarron was a jockey and not expected to understand. (1 SER 0252.) McCarron completely trusted the petitioners. (1 SER 0264, 0274, 0276.) The petitioners never suggested to McCarron that he obtain independent advice about the investments. (1 SER 0271-0272.)

The petitioners intentionally concealed that they were recommending or presenting ventures in which the petitioners had interests that would pay compensation to the petitioners beyond the five percent McCarron agreed to

pay for all the petitioners' services. (1 SER 0179-0181, 0184, 0189-0191, 0194, 0197-0198, 0200, 0204-0206, 0254, 0257, 0259-0261, 0266; 2 SER 0440-0441.) McCarron terminated petitioners in 1988. (1 SER 0132:4-10, 0273.) He filed this action in 1989.

Respondents sued under California law and the federal Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. sections 1961 *et seq.* The district court conducted a jury trial for both lawsuits in 1992. After watching and listening to the testimony and considering the documentary evidence, the jury unanimously decided for respondents on the federal RICO claims and the claims under California law.

Regarding the claims under California Law, California Code of Civil Procedure section 338(d), for example, requires the commencement of a lawsuit within three years after the aggrieved party discovered the facts constituting the fraud. As stated above, substantial evidence shows that neither respondent discovered the facts constituting the petitioners' fraud until after 1986. (Pet.App. 3a.) Respondents sued the petitioners in 1989. Thus, the judgment determined that respondents timely filed their lawsuits under California law.

The district court, however, first entered judgments under the federal RICO claims only. In *Pincay v. Andrews*, 238 F.3d 1106 (9th Cir. 2001) ("*Pincay I*") the Ninth Circuit reversed (Pet.App. 18a-25a), but clearly stated that "[o]ur holding is limited to the civil RICO claims at issue on appeal and does not disturb the jury's verdict with regard to [respondents'] state law claims." (Pet.App. 25a.)

The Ninth Circuit denied respondents' request for a rehearing and rehearing en banc. This Court denied respondents' petition for a writ of certiorari. *Pincay v. Andrews*, 534 U.S. 885 (2001).

After remand, the respondents filed a motion for entry of judgment on the state law verdicts. Petitioners opposed the motion by filing a memorandum of points and authorities and cross-motion for stay or remittitur. (Pet.App. 26a-42a.) The memorandum presented only the following relief for the district court's consideration: (a) deny respondents' motion or grant remittitur (Pet.App. 33a, 38a, 42a); (b) direct respondents to continue with mediation and pursue their claims in bankruptcy court (Pet.App. 32a); and (c) stay all further proceedings in the district court or grant a remittitur. (Pet.App. 32a-33a, 42a.) The district court granted respondents' motion, denied petitioners' cross-motion for a stay or remittitur, and, therefore, the district court entered judgment for respondents under California law. (Pet.App. 15a.) Petitioners did not file a motion under Rule 50(b) of the Federal Rules of Civil Procedure within ten days after the entry of the judgments. (Pet.App. 16a.)

The petitioners did not file a notice of appeal within thirty days after the judgments. The district court, however, granted an extension to file an appeal, and in *Pincay v. Andrews*, 389 F.3d 853 (9th Cir. 2004), a divided *en banc* panel of the Ninth Circuit affirmed the extension. This Court denied respondents' petition for a writ of certiorari. *Pincay v. Andrews*, 125 S. Ct. 1726 (2005). While the petition was pending, however, a divided three-judge panel of the Ninth Circuit affirmed the judgments under California law. (Pet.App. 1a-4a.) The Ninth Circuit held as follows:

> Applying state law . . . we recite the facts relevant to our decision. . . . The [respondents] testified that relying on the [petitioners'] assurances and not reading the documents tendered [respondents], [respondents] did not discover the facts constituting their claim until after 1986. . . . The argument now advanced by [petitioners] is, in substance, an attack on the jury findings and on the jury instructions. It is an attack that comes over eleven years after the trial and the verdicts. . . . [Petitioners] now argue that the California rule [regarding the statute of limitations] is other than that embodied in the instructions and explicitly stated in the district court on remand from us. But neither in the district court nor before this court has [the petitioners] sought to evoke the plain error exception. We decline to do so in a case that went to trial in [1992]. . . . As the jury not unreasonably read the evidence, the [respondents] were the prey of sophisticated confidence men. . . . The judgment of the district court is AFFIRMED.

(Pet.App. 3a-4a.)

Judge Kleinfeld dissented, arguing as follows:

> . . . [Petitioners] told [respondents], plainly and repeatedly, in writing, that the [petitioners] were indeed charging [respondents] more than 5% on some investments . . . at least nine years before [respondents] sued [petitioners]. . . . The majority disposition incorrectly claims that the [petitioners] are making a late attack on the jury instructions and findings. . . . There is no reason even to

> reach or consider the instructions. The [petitioners'] brief makes it crystal clear that they claim they are entitled as a matter of law, under the doctrine of law of the case, to have the [statute of] limitations bar applied to the state law claims because the reason for its applicability are indistinguishable from the reasons why we found it applied to the RICO claims in [*Pincay I*]. And it is crystal clear that they are right.

(Pet.App. 5a-6a, Kleinfeld J., dissenting.)

Judge Kleinfeld concluded that *Pincay I*'s holding controlled the state law claims. (Pet.App. 6a-7a.) *Pincay I* stated, however, that "[o]ur holding is limited to the civil RICO claims at issue on appeal and does not disturb the jury's verdict with regard to [respondents'] state law claims." (Pet.App. 25a.) Accordingly, Judge Kleinfeld conceded that the Ninth Circuit limited its decision in *Pincay I*. (Pet.App. 6a-7a, Kleinfeld J., dissenting.)

Petitioners requested a rehearing and rehearing en banc arguing that their memorandum of points and authorities, discussed above, was a motion under Rule 50(b) of the Federal Rules of Civil Procedure. (Petition ("Pet.") 13.) The Ninth Circuit rejected petitioners' argument, and denied petitioners' request for rehearing and rehearing en banc. (Pet.App. 16a-17a.) The petitioners filed the petition for a writ of certiorari extant.

REASONS TO DENY PETITION

As mentioned *supra*, no matter what the Court decides in *Unitherm*, substantial evidence supports the judgments for respondents under California law. (Pet.App. 1a-4a.) Accordingly, no basis exists for the Court to postpone this case pending resolution of *Unitherm*.

The Ninth Circuit's decision to deny petitioners' request for a rehearing does not merit this Court's review of what is a Rule 50(b) motion. *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), makes clear that this Court does not allow counsel's unexpressed wants and intentions to be the measure of a motion. *Id.* at 51, 53. *Johnson*'s teaching is consistent with federal practice today. For example, Rule 7(b) of the Federal Rules of Civil Procedure requires motions to set forth the relief or order sought. Moreover, *Johnson*'s teaching recognizes that in deciding whether a motion expresses the wants or intentions of the moving party or the moving party's counsel, a court must consider the nature of the filing and the circumstances in each particular case. *Id.* at 51. Thus, *Johnson*'s teaching is consistent with *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) (" . . . [A] court may construe the Rules liberally in determining whether they have been complied with. . . ."). *Id.* at 317.

In any event, regardless of the Ninth Circuit's and the district court's view of petitioners' memorandum as not constituting a Rule 50(b) motion, the Ninth Circuit's holding is correct. Indeed, the petitioners are faced with a record that has substantial evidence supporting the judgments under California law.

OPPO

BR

OSITION

RIEF

1. *Unitherm* Provides No Basis for Reviewing this Case

No matter what the Court decides in *Unitherm*, the Ninth Circuit's and the district court's decisions are consistent with *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which requires courts to apply the law regardless of the jury instructions. *Id.* at 517. The Ninth Circuit and the district court made clear that they applied California law. (Pet.App. 2a-4a ["Applying state law . . . [t]he judgment of the district court is AFFIRMED."]; Pet.App. 12a "[Petitioners] argue that . . . 'the standard for finding a plaintiff suing a fiduciary is on inquiry notice is the same under state and federal law.' . . . It is not. *Compare* [citations omitted]. . . .") Neither the Ninth Circuit nor the district court based their holdings simply on petitioners' failure to object to the jury instructions, all of which the petitioners either co-wrote or accepted. (*See* Pet.App. 3a [both parties submitted the language to the district court].)

If *Unitherm* decides, for example, that a court of appeal may consider the sufficiency of the evidence when the appellant did not file a Rule 50(b) motion, the record here shows that the Ninth Circuit considered the sufficiency of the evidence and decided that substantial evidence supports the district court's judgment under California law. (Pet.App. 2a-4a.) The Ninth Circuit's judgment is correct. For example, California is committed to the view that where a fiduciary relationship causes the beneficiary to rely on the fiduciary, the awareness of facts that may call for investigation does not incite suspicion under these special circumstances. The record (Pet.App. 12a) shows the district court cited, for example, *Bennett v.*

Hibernia Bank, 47 Cal. 2d 540, 305 P.2d 20 (1956), which states the following:

> . . . [B]ecause of the existence of a fiduciary relationship, a plaintiff need not disprove that an earlier discovery could have been made upon a diligent inquiry but need show only that he made an actual discovery of hitherto unknown information within the statutory period before filing the action. [citation]. . . .

Id. at 563.

The district court also cited *Eisenbaum v. Western Energy Resources, Inc.*, 218 Cal. App. 3d 314, 267 Cal. Rptr. 5 (1990), which states the following:

> As to the effect of that fiduciary relationship on accrual of the cause of action . . . [citation] . . . "[W]here a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion [citation] and do not give rise to a duty of inquiry [citation]. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist. [Citation.]" . . . [*T*]*he limitations period does not begin to run until plaintiff actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available.* [Citation]. . . . "[*T*]*he plaintiff is entitled to rely upon the assumption that his fiduciary is acting in his behalf.*" [Citation].

Id. at 325 (original emphasis).

Petitioners knew that respondents were not familiar with business activities or investments, and were further limited by their lack of education and, in respondent Pincay's case, a language barrier as well. Petitioners

represented themselves to be and were fiduciaries for respondents. Yet petitioners took advantage of that fiduciary relationship to defraud the respondents.

A straightforward reading of *Pincay I* shows that the Ninth Circuit did not hold as a matter of California law that respondents actually knew or were aware of enough facts to warrant an investigation of the petitioners more than three years before respondents sued the petitioners in 1989. (*See, e.g.*, Pet.App. 22a-23a.) Thus, *Pincay I* clearly stated, as shown above, that "our holding is limited to the [federal] civil RICO claims at issue on appeal and does not disturb the jury's verdict with regard to [respondents'] state law claims." (Pet.App. 23a.) Indeed, *Pincay I* reversed the RICO judgments despite the fiduciary relationship between the parties. (Pet.App. 23a.)

Judge Kleinfeld's dissent below argued that respondents were told in writing that the petitioners were charging respondents more than five percent on some investments. (Pet.App. 6a.) Yet the record has substantial evidence that throughout their fiduciary relationship with respondents, the petitioners intentionally induced respondents to sign documents as part of the petitioners' scheme. For example, Judge Kleinfeld refers to a document in *Pincay I*. (Pet.App. 6a, Kleinfeld J., dissenting [referring to Pet.App. 24a].) The document, however, only states that one petitioner "will receive compensation from the [venture] . . . in the amount of five percent (5%) of the capital contributions to be paid by such investors." (II ER 497-498.) The document fails to tell the respondents that this would cause them to pay the petitioners beyond five percent of respondents' annual riding earnings. *Id.* Indeed, none of the petitioners' documents told respondents that they were paying petitioners more than five percent of the

respondents' annual riding earnings. The jury, after watching and listening to the respondents testify, determined that the respondents were not knowledgeable enough to realize that the petitioners' documents would cause respondents to pay the petitioners far more than the agreed upon five percent of the respondents' annual riding earnings. The Ninth Circuit reviewed de novo the district court's judgment of the California law and affirmed the district court's judgment. (Pet.App. 2a-4a). Research finds no intervening California Supreme Court case that casts doubt on the Ninth Circuit's decision.

Petitioners request that the Court should consider summarily granting, vacating, and remanding (or GVR) this case after *Unitherm*. (Pet. 6.) Yet requiring the Ninth Circuit to delve again into the facts of this case and the California law, months after the Ninth Circuit has denied a rehearing, makes no sense. Petitioners face a record that has substantial evidence supporting the judgments for respondents under California law. Moreover, this case has no importance beyond the parties' fact-particular dispute.

2. Ninth Circuit's Decision to Deny Rehearing Does Not Merit this Court's Review

The petitioners concede that the Ninth Circuit's decision to deny rehearing is consistent with *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), which makes clear that this Court does not allow counsel's unexpressed wants and intentions to be the measure of a motion. *Id.* at 51, 53.

The record shows the district court did not understand petitioners' memorandum as requesting a Rule 50 judgment. The district court's understanding is reasonable. For example, the district court said as follows:

> In a cross-motion-embedded within [petitioners'] opposition to [respondents'] motion-defendants move this Court to order a remittitur reducing [respondents'] damage awards by the amounts [respondents] have earned over the past 9 years. (Pet.App. 10a.)

Moreover, the district court's conclusion confirms the district court's understanding of petitioners' memorandum. (Pet.App. 15a.)

The petitioners urge that the district court did not liberally construe the petitioners' memorandum. (Pet. 7-8.) The record, however, shows no abuse of discretion in the district court's understanding that petitioners' memorandum did not request a Rule 50 judgment. Indeed, it is one thing for a memorandum to ask the district court to deny a motion or grant a remittitur. It is quite another for a memorandum to ask the district court to enter a Rule 50 judgment. Having conducted proceedings in this case since 1989, the district court knows the parties and their counsel, and knows their respective writing and arguing styles. Surely if the petitioners had intended the memorandum to be a Rule 50 motion, petitioners' counsel would have had the memorandum say so. Accordingly, the district court is within its discretion to construe the memorandum as not moving for a Rule 50 judgment. Indeed, as mentioned above, Rule 7(b) requires motions to set forth the relief or

order sought, and *Torres* instructs that " . . . a court may construe the Rules liberally in determining whether they have been complied with. . . ." *Torres*, 487 U.S. at 317.

Petitioners concede that they could have filed a Rule 50 motion. (Pet. 21) The question, then, inevitably comes back to why did the petitioners not file the motion. Accordingly, since the facts underlying such an inquiry will vary from case to case, the Ninth Circuit's and the district court's unpublished decisions regarding the petitioners' memorandum are limited to the facts of this case. Allowing the decisions to stand will, therefore, have no national impact. In any event, regardless of the Ninth Circuit's and the district court's decisions regarding the petitioners' memorandum, the petitioners are faced with a record that shows substantial evidence supports the judgments for respondents under California law.

Petitioners argue that the Court should use this case to overrule *Johnson*'s teaching that courts cannot measure a motion by the unexpressed wants and intentions of the moving party or the moving party's counsel. *Johnson,* 344 U.S. at 51. Yet the teaching is simply stating common sense, and is neither complicated nor unfair nor difficult to understand. By not allowing a moving party to rely on the moving party's unexpressed intentions or wants, *Johnson*'s teaching assures that motions will set forth the relief requested. Thus, the teaching is consistent with Rule 7(b) and *Torres*. The Ninth Circuit's reliance on *Johnson*'s teaching is correct and does not qualify for review by this Court.

CONCLUSION

The Court should not hold the petition pending the decision in *Unitherm*. The Court should deny the petition.

Respectfully submitted,

NEIL PAPIANO
Counsel of Record
PATRICK MCADAM
IVERSON, YOAKUM, PAPIANO & HATCH
624 South Grand, 27th Floor
Los Angeles, California 90017
(213) 624-7444

Counsel for Respondents

3

No. 05-421

IN THE

Supreme Court of the United States

VINCENT S. ANDREWS, ROBERT L. ANDREWS and VINCENT ANDREWS MANAGEMENT CORP.,
Petitioners,

v.

LAFFIT PINCAY, JR. and CHRISTOPHER J. MCCARRON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

ROBERT SILVER
ANDREW HAYES
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

H. BARTOW FARR, III *
FARR & TARANTO
1220 19th Street, NW
Suite 800
Washington, DC 20036
(202) 775-0184

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

No. 05-421

VINCENT S. ANDREWS, ROBERT L. ANDREWS and VINCENT ANDREWS MANAGEMENT CORP.,
Petitioners,

v.

LAFFIT PINCAY, JR. and CHRISTOPHER J. MCCARRON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

In their brief in opposition respondents essentially make two arguments: *first*, that this Court need not hold the petition pending the decision in *Unitherm Food Systems, Inc. v. Swift Eckrich, Inc.*, No. 04-597, argued on November 2, 2005, because the Ninth Circuit in this case has already reviewed the sufficiency of the evidence under California law and, *second*, that the "unexpressed intention or wants" standard set forth in *Johnson v. New York, N.H. and H.R. Co.*, 344 U.S. 48, 51 (1952), and applied by the Ninth Circuit below (*see* Pet. App. 16a), is consistent with, rather than in conflict with, the standards established under Rule 7(b) of the Federal Rules of Civil Procedure for evaluating the sufficiency of filings. Neither argument is correct.

1. This Court has made clear that a federal court, in deciding a motion for judgment as a matter of law, should apply the law as it is correctly set forth in the motion for judgment, rather than a misstatement of the law embodied in the jury instructions. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 518 (1988). The threshold question here, therefore, is whether, in order to take advantage of that rule, petitioners were required to file a post-verdict motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure, in addition to their earlier motion for judgment as a matter of law under Rule 50(a). The need for a second motion is precisely the question presented in *Unitherm*. As a result, this Court should hold the petition pending the decision in *Unitherm*, with the eventual disposition to turn on what the Court in *Unitherm* ultimately decides. *See* Pet. 17 (discussing possible dispositions).

Respondents argue that it is unnecessary to hold the petition, asserting that the Ninth Circuit has already reviewed the evidence regarding the timeliness of filing under California law. *See* Br. in Opp. 10 ("the record here shows that the Ninth Circuit considered the sufficiency of the evidence and decided that substantial evidence supports the district court's judgment under California law.") But this assertion misses the point. To the extent that the Ninth Circuit undertook any review of the limitations evidence, it did so by measuring the sufficiency of the evidence according to California law *as it was stated in the jury instructions*. *See* Pet. App. 3a-4a. That approach is wrong under the principles of *Boyle* unless Rule 50(b) required petitioners to file a post-verdict motion (and they are deemed not to have done so, *see* pages 4-6 *infra*), thus bringing matters full circle to the issue in *Unitherm*. And, despite respondents' assertion to the contrary, Br. in Opp. 10, it is absolutely clear that the Ninth Circuit was applying the jury instruction version of California law because it flatly refused to address petitioners' argument "that the California rule is other than that embodied in the in-

structions and explicitly stated by the district court on remand from us . . . ." Pet. App. 4a; *see also* Pet. App. 6a (Kleinfeld, J., dissenting) ("[t]here is no reason even to reach or consider the instructions").

The rest of respondents' submission on the *Unitherm* issue consists mainly of efforts to show that their suit was timely filed under California law. But this mix of factual and legal arguments provides no basis for denying the petition (as opposed to holding it for the decision in *Unitherm*). To begin with, even though respondents argue at some length that they acted diligently, Br. in Opp. 2-5, the Ninth Circuit has already held, on the same factual record, that respondents were fatally lax in bringing their federal RICO claims. *See Pincay v. Andrews*, 238 F.3d 1106 (9th Cir. 2001), reprinted at Pet. App. 18a-25a. Indeed, the Ninth Circuit found respondents' claims of justified ignorance to be wholly unpersuasive, observing that "[i]t is hard to imagine what would constitute 'enough information to warrant an investigation' if receiving a written disclosure of one's purported injury does not." Pet. App. 24a. If California limitations law is the same as RICO limitations law—as we contend that it is—then the same "written disclosure" would require judgment for petitioners on respondents' state law claims as well.

To get around this problem, respondents argue that California limitations law is different from RICO law. *See* Br. in Opp. 10-11. We obviously disagree with that view, but, in any event, the question is one for the Ninth Circuit to decide. If this Court establishes in *Unitherm* that verdict losers need not file a second motion for judgment as a matter of law—and thus that the case has automatically been submitted "subject to the court's later deciding the legal questions raised by the [prior Rule 50(a)] motion," Rule 50(b), Fed. R. Civ. P.; *see also* Pet. 8-17—then the Court should remand the case to the Ninth Circuit so that the court of appeals may decide what, in fact, California limitations law is. Then, either the

Ninth Circuit or the district court must apply that law to determine whether respondents' state law claims were filed in time. Notwithstanding respondents' contentions, therefore, the decision in *Unitherm* potentially controls the disposition of this case.

2. Respondents' arguments about the "unexpressed intention or wants" standard set forth in *Johnson*—employed by the Ninth Circuit below to hold that petitioners' post-verdict filing was insufficient to raise a claim to judgment as a matter of law (*see* Pet. App. 16a) —are equally unavailing. Notably, respondents do not dispute the basic principle that the adequacy of district-court filings should be judged by the standards of Rule 7(b), Fed. R. Civ. P. Nor, indeed, do they question that the federal rules should be liberally construed. *See* Br. in Opp. 14-15 (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988)). Rather, they assert only that "*Johnson*'s teaching" is "consistent with Rule 7(b) and *Torres*." Br. in Opp. 15. The short answer is that it is not.

This Court in *Torres* stated plainly that "'mere technicalilties' should not stand in the way of consideration of a case on its merits." 487 U.S. at 316 (discussing Federal Rules of Appellate Procedure). Applying that principle to the requirements of Rule 7(b), the Eighth Circuit has recently remarked that the purpose of Rule 7(b) is "to give notice of the basis for the motion to the court and the opposing party so as to avoid prejudice . . .," adding that "[t]he particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized." *Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789, 793 (8th Cir. 2003). As we noted in the petition, the Advisory Committee on Civil Rules likewise has emphasized that Rule 7(b) requires only "a fair indication to court and counsel of the substance of the grounds relied on." Advisory Committee Note to 1966 Amendment of Rule 59(d), 39 F.R.D. 69, 122

(1966). The evident goal of these modern pleading standards is to assure that substance prevails over form.

The *Johnson* standard, however, promotes form, and form alone. Under that standard the critical inquiry is not whether a litigant has given a "fair indication" of the substance of its position but whether it has expressly asked for the particular relief in question. The outcome-determinative nature of the difference can be gleaned from *Johnson* itself, where the Court refused to construe a party's motion to set aside a judgment as seeking judgment on its own behalf, even though it was entirely natural to suppose that the movant (who had earlier filed a Rule 50(a) motion) was not just trying to avoid an unfavorable judgment, but actually asserting a legal basis for judgment in its favor. *See* 344 U.S. at 51. The Ninth Circuit followed that same, unduly narrow, course in this case. *See* Pet. App. 16a.

Respondents contest the idea that petitioners were pressing their right to judgment, saying that "the district court did not understand petitioners' memorandum as requesting a Rule 50 judgment." Br. in Opp. 14; *see also id.* ("[t]he record . . . shows no abuse of discretion in the district court's understanding that petitioners' memorandum did not request a Rule 50 judgment"). This assertion simply highlights the problems with the *Johnson* standard. Properly viewed, the issue is not whether petitioners "request[ed]" a judgment in their favor, but whether, in substance, their legal arguments directly led to that result. Here, they did. As we noted in the petition, *see* Pet. 21-23, the memorandum opposing judgment for respondents argued in the plainest terms that there is no difference between the statute of limitations for RICO claims and the statute of limitations for state law claims and that respondents' state law claims were thus filed out-of-time. If that argument is right, then the necessary outcome for the state law claims would be the same as it was for the RICO claims: judgment for petitioners as a matter of law.

In short, the Ninth Circuit followed *Johnson* to a result that is out of place under current rules. This Court should grant review to consider the continuing vitality of *Johnson* in light of the governing principles of Rule 7(b).

CONCLUSION

The petition should be held pending the decision in *Unitherm*. Once that case has been decided, the Court should either grant, vacate, and remand in accordance with that decision or grant this petition to address important unresolved issues.

Respectfully submitted,

ROBERT SILVER
ANDREW HAYES
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

H. BARTOW FARR, III *
FARR & TARANTO
1220 19th Street, NW
Suite 800
Washington, DC 20036
(202) 775-0184

* Counsel of Record